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Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion

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CONTROL OF THE RESERVATION ENVIRONMENT: TRIBAL PRIMACY, FEDERAL DELEGATION, AND THE LIMITS OF STATE INTRUSION

Judith V. Royster* & Rory SnowArrow Fausett**

Abstract: Inter-sovereign disputes over environmental regulation in Indian country are increasingly common. The federal government, individual states, and native nations all assert interests in controlling pollution on Indian reservations; the question of which sovereign should regulate in this area presents complex issues of federal law, native self-determination, and state autonomy. In this Article, the authors trace the roots of federal, state, and tribal authority to control events within reservation boundaries. Applying a three-tiered analysis to the problem, the authors examine: express federal preemption of state pollution control laws; federal program delegation to native governments as a bar to state regulation; and established common law barriers to state authority in Indian country. The authors conclude that state pollution control regulation, whether aimed at native or non-native persons and activities, is prohibited in Indian country.

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[W]e beg leave to observe and to remind you that the Cherokee are not foreigners but original inhabitants of America, and that they now inhabit and stand on the soil of their own territory and that the limits of this territory are defined by the treaties which they have made with the government of the United States, and that the states by which they are now surrounded have been created out of land which was once theirs, and that they cannot recognize the sovereignty of any state within the limits of their territory.¹

Tribal and state jurisdictional confrontations abound in Indian country.² Control over reservation environmental protection increasingly is a focus of these inter-sovereign disputes. Native nations, long

1. R. COTTERILL, *THE SOUTHERN INDIANS* 218 (1954) (from a letter of 1823 to President Monroe from the Cherokee chiefs concerning their suggested removal to Arkansas from their original homelands claimed by the state of Georgia).

2. The authors generally prefer the term "Native American," or the shortened version, "native," to the term "Indian." There are, however, some exceptions. First, "Indian country" is used as a term of art to designate all lands within the territorial boundaries of a reservation, as well as additional native lands located outside reservation borders. See *infra* note 207 (statutory definition of Indian country). Much of the discussion in this Article pertaining to reservation pollution, however, will differentiate between native and non-native lands within Indian country. Second, while we recognize that the euphemisms of "Indian law" and "Indian policy" patently are incorrect as reflecting derivations of tribal legal and policy preferences, we use those terms in the popular sense to refer to domestic United States law and policy regarding relations among the federal government, the states, and the native nations.

threatened with the loss of their extractable and renewable resources, now are faced with losing as well the ability to protect those natural assets remaining to them. Preserving the natural resources of Indian country for future generations of native peoples ultimately will mean little if the air is polluted, the waters unfit to drink, and the land poisoned.

Recent case law and scholarly commentary have served to direct renewed attention to environmental issues and pollution control problems within native territories.³ The primary legal issue that has emerged is who should regulate environmental protection in Indian country.⁴

3. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985); Allen, *Who Should Control Hazardous Waste on Native American Lands?: Looking Beyond Washington Department of Ecology v. EPA*, 14 *ECOLOGY L.Q.* 69 (1987); Du Bey, Tano & Parker, *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 *ENVTL. L.* 449 (1988); Note, *Regulatory Jurisdiction over Non-Indian Hazardous Waste in Indian Country*, 72 *IOWA L. REV.* 1091 (1987) [hereinafter *Non-Indian Hazardous Waste Regulation*]; Note, *Environmental Law—Federal Indian Law—Recent Developments—State of Washington*, *Department of Ecology v. EPA*, 27 *NAT. RESOURCES J.* 739 (1987). For a recent non-scholarly overview of environmental activities in Indian country, see [Current Developments] *Env't Rep. (BNA)* 1920 (Jan. 27, 1989).

Attention to environmental matters in Indian country, however, is hardly a recent phenomenon. The mid- to late 1970's, for example, saw a surge of legal materials on native environmental issues. See, e.g., COUNCIL OF STATE GOVERNMENTS, *INDIAN RIGHTS AND CLAIMS: ENVIRONMENTAL MANAGEMENT CONSIDERATIONS FOR THE STATES* (1977); P. MAXFIELD, M. DIETERICH & F. TRELEASE, *NATURAL RESOURCES LAW ON AMERICAN INDIAN LANDS* (1977) [hereinafter P. MAXFIELD]; Anderson, *Strip Mining on Reservation Lands: Protecting the Environment and the Rights of Indian Allotment Owners*, 35 *MONT. L. REV.* 209 (1974); Schaller, *The Applicability of Environmental Statutes to Indian Lands*, 2(8) *AM. INDIAN J.* 15 (1976); Schmidman, *Indians and the Environment: An Examination of Jurisdictional Issues Relative to Environmental Management*, 4 *COLUM. J. ENVTL. L.* 1 (1977); Will, *Indian Lands Environment—Who Should Protect It*, 18 *NAT. RESOURCES J.* 465 (1978); Comment, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 *U. COLO. L. REV.* 63 (1976) [hereinafter *Applicability of Federal Pollution Acts*].

4. In this Article the authors address solely the issue of precluding state jurisdiction over environmental matters in Indian country, and not the related issue of which of the remaining sovereigns—native nations or the federal government—should have primacy over environmental affairs within native territorial boundaries.

The legitimacy of federal environmental powers over native reservations is much more problematical. The merits of this issue will not be debated fully here; to facilitate the present discussion only, the authors have accepted that federal environmental laws of general applicability to the United States at large apply with equal force to native governments. In the broader context, the authors reject any unilateral arrogation of federal authority.

Both tribal and federal sovereigns appear to agree that the optimum solution to pollution control within Indian country is for those tribes that are willing and able, to assume control over environmental regulation, with the Environmental Protection Agency ("EPA") serving as an interim facilitator and a source of funding, assistance, and technical expertise. To an extent, these practices promote tribal self-government, build tribal expertise in environmental matters, further the concept that native nations are more than mere geopolitical subdivisions of the states, and prohibit the imposition of state regulatory authority over native peoples and reservations.

Section I of this Article presents an overview of regulatory jurisdiction in Indian country, as a necessary backdrop to the issue of state assertions of pollution control authority over native territories. Section II outlines the types of pollution control laws that the states may attempt to impose in Indian country. In Section III, the Article sets forth a three-tiered analysis by which a court may determine whether these state pollution control laws are applicable in Indian country. At the first level, the court determines whether federal pollution control legislation expressly preempts state pollution control laws. If not, the court next considers whether the statutory interpretation scheme of the federal Environmental Protection Agency, involving federal primacy and program delegation to native governments, bars state regulation. If this second level of analysis does not preclude state regulation, the court lastly determines whether the standard Indian common law barriers to state authority—federal preemption and infringement on tribal sovereignty—serve to prohibit state jurisdiction. The authors conclude that under this three-tiered analysis, state pollution control laws and regulations, over both native and non-native persons and activities, are prohibited in Indian country.

I. REGULATORY JURISDICTION IN INDIAN COUNTRY

Pollution control is primarily a regulatory activity. The government attempts to regulate and control the amount and placement of pollutants before incidents of ecological insult occur. These efforts aim to maintain pollution at or below an acceptable level and, perhaps, to reduce overall pollution. Which government can regulate pollution in Indian country—over which persons and on what lands—is a source of continuing conflict among the three governments involved in regulatory activities in native territory.

Jurisdiction in Indian country is apportioned among three governments—federal, tribal, and state—all of which claim a degree of regulatory authority over the territory of native nations. The federal government claims the right to regulate by virtue of its asserted position as the dominant sovereign throughout the entirety of the United

But delegation of program authority under the federal pollution control acts is incompatible with true tribal self-determination. Federal delegation imposes upon native nations the environmental values and concerns, and the methods for addressing them, of the federal government.

By definition, a program imposed upon a tribal government is not freely chosen. Regardless of the beneficence of the federal pollution control schemes, and regardless of whether a tribe freely would choose those same programs, the mere fact of federal imposition severs the "self" from the "determination." Tribal primacy should be released, to the extent tribes are willing to shoulder the political and fiscal encumbrances, from subordination to federal laws and standards. Tribes should have true primacy, not a primacy dependent upon federal pollution control programs.

States' internationally-recognized borders. Native governments are entitled, pursuant to their inherent sovereign powers, to regulate the persons and lands within the tribes' territorial domains. State governments assert regulatory authority on the ground that native nations are not extraterritorial to the states that abut them, and many times also on the ground that non-natives within reservation domains are properly the subjects of state rather than tribal regulation and enforcement. This section will survey the basis of each government's assertion of regulatory jurisdiction in Indian country and will describe the current status of each government's authority to regulate under domestic law.

A. Federal Regulatory Jurisdiction

The basis for the assertion of federal authority in Indian country stems irreducibly from the dual fictions of discovery and conquest incorporated into United States domestic law during the early nineteenth century by Chief Justice John Marshall. Marshall outlined "that great and broad rule" of the colonizing European powers, that "discovery" gave to the discovering nation the exclusive right against other European powers to acquire title from the aboriginal inhabitants.⁵ In Marshall's hands, however, this agreement of convenience among the discovering nations was transformed into a doctrine vesting absolute title in fee in the discoverer; the native nations necessarily retained only a lesser right of occupancy to the lands they inhabited.⁶ Marshall then fictionalized discovery even further, into a "conquest" of the continent, thus transmuting the already fictive native right of

5. *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823). The title thus derived necessarily was inchoate, for discovery vested in the discoverer only an exclusive or preemptive entitlement to deal with the natives as against other cisatlantic crowns. The discovering nation's entitlement could be made complete only by extinguishing the indigenous peoples' natural title. See, e.g., R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 46-49 (1980); Henderson, *Unravelling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977). For a Native American parody on the discovery doctrine, see Revard, *Report to the Nation*, 6 AM. INDIAN Q. 305 (1982) (claiming various parts of Europe in the name of the Osage Nation).

6. *M'Intosh*, 21 U.S. (8 Wheat.) at 574:

While the different nations of Europe respected the rights of natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

With this creative manipulation of the discovery doctrine, Marshall devised a notion of absolute title from its inchoate title root. The residual right of occupancy in the native nations ironically is characterized in the legal lexicon as "Indian title." This "Indian title" is not a property right and carries no legal title. See *infra* note 20.

occupancy into a profound legal disability, persistent to this day, that prevents native tribes from alienating their land to any entity other than the federal government.⁷

Within a decade Marshall extended the ramifications of the discovery doctrine beyond the lands issue. In part because the native nations had only a right of occupancy to the lands they inhabited, Marshall ruled that they could not be true foreign nations, but merely "domestic dependent nations."⁸ As such, the tribes and their territories were a part of, and not apart from, the United States itself.⁹ The exercise of certain sovereign powers, notably the right freely to alienate land and the right to engage in foreign relations, could now be accomplished only through the intermediary of the federal government.¹⁰ Judicial alchemy in the domestic courts thus transformed the United States from a discovering nation into a superior sovereign.¹¹

7. *M'Intosh*, 21 U.S. (8 Wheat.) at 591:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants . . . [and] to be deemed incapable of transferring the absolute title to others.

The legal disability articulated by Marshall in 1823 was not the shared vision of all colonists. For a discussion of early views on "the Indians' rights to dispose of their property as they saw fit upon their own authority," see Anderson, *Samuel Wharton and the Indians' Rights to Sell Their Land: An Eighteenth Century View*, 63 W. PA. HIST. MAG. 121 (1980).

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

9. Native nations "are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens." *Id.* The view that native nations are subsumed within the United States reached its ultimate articulation in *United States v. Kagama*, 118 U.S. 375, 379 (1886):

But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.

10. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18:

[The Cherokee] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

11. See, e.g., *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886) ("[t]he recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior").

Even domestic law, however, recognizes that this arrogation of superior dominion by the United States, as a successor to the discovering nations, did not divest native nations of all sovereignty. Chief Justice Marshall maintained that tribes retained all rights not inconsistent with the doctrine of discovery:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil

Control of the Reservation Environment

The federal government, relying upon its perceived superordinate sovereignty, asserts the right to regulate within the entirety of its borders, including reservation territories. This federal regulatory power stems from two basic sources. Congress' asserted right of plenary power over native nations allows it to enact legislation specifically affecting native tribes, lands, and peoples. General federal legislation, on the other hand, usually is held applicable to natives through a judicially created doctrine that natives ordinarily should not be immune from federal laws of general applicability.

1. *Federal Plenary Power*

Federal power—more particularly, congressional power—over native nations is said to be plenary.¹² Domestic courts have positioned the legal origins of this congressional power, derived from the doctrine of discovery, in the Constitution.¹³ One of the primary tenets of the plenary power doctrine is the unilateral power of the federal government to legislate specifically regarding native peoples, lands, and gov-

from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

12. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

13. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). The constitutional provisions frequently invoked to buttress the plenary power doctrine include the Indian Commerce Clause, allocating to Congress the power to regulate commerce "with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3; the Treaty Power, under which the young Republic treated with the native nations as with any foreign nation, U.S. CONST. art. II, § 2, cl. 2; the Supremacy Clause, which lists treaties among the supreme laws of the land, U.S. CONST. art. VI, § 2; and the Property Clause, permitting Congress to "make all needful Rules and Regulations" concerning property of the United States, U.S. CONST. art. IV, § 3, cl. 2.

Chief Justice Marshall invoked as well the War Power. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (The Constitution "confers on Congress the powers of war and peace: of making treaties, and of regulating commerce . . . with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians."). Judicial use of the Constitution to justify exercises of congressional power is, in truth, little more than an after-the-fact search for legal underpinnings. In its blunter opinions, the Court on occasion has exposed the bare skeleton of the doctrine: that the federal government has plenary legal power simply because it has the concomitant raw political power:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers . . . must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes.

United States v. Kagama, 118 U.S. 375, 384-85 (1886).

ernments, and to exercise near complete control over significant aspects of native life.¹⁴

Plenary power involves more, however, than the ability to impose a federal overlay of regulations onto tribal life. In stark fact, it means that congressional whim ultimately can control fully the tribal exercise of sovereign powers.¹⁵ Under the ruse of plenary power, Congress can strip tribes of specific governmental powers,¹⁶ force state jurisdiction onto unconsenting and unwilling native governments,¹⁷ unilaterally abrogate native treaties,¹⁸ or choose even to end the existence of tribes

14. For example, federal legislation governs such areas as trading with the native tribes, 25 U.S.C. §§ 261-266 (1982); and leasing of allotted and unallotted lands for mining and timber harvesting, *id.* §§ 391-412.

The exercise of plenary power to legislate over native nations, however, is not confined to the economic arena. See, e.g., Major Crimes Act, 18 U.S.C. § 1153 (1982) (arrogating to the federal government the authority to try natives for enumerated crimes committed in Indian country).

15. *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (native sovereignty "'exists only at the sufferance of Congress and is subject to complete defeasance'" (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis in *Rice*)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"); see also Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 284-85 (1984) ("Whatever Congress wants, Congress gets . . .").

For a view that plenary power is not such a bad thing, see Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' "Algebra"*, 30 ARIZ. L. REV. 413 (1988). Professor Laurence champions the doctrine, presenting his belief that "it is to the benefit of the health and stability of Indian law to . . . accept[] the plenary power, and to work to control the exercise of it." *Id.* at 426. He condescendingly describes as "charming" the native vision of separate, fully equal, full self-determinative sovereignty for native nations. *Id.* at 437.

Laurence's argument necessarily is skewed by his failure to address any exercise of plenary power other than imposition of due process and equal protection guarantees on tribal governments. For a brief discussion of other congressional depredations on native sovereign powers under the guise of plenary power, see Newton, *supra*, at 234-35.

The Laurence thesis triggered a brief but rousing scholarly exchange on the issue of congressional plenary power. Compare Professor Williams' response, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's "Learning to Live with the Plenary Power of Congress over the Indian Nations"*, 30 ARIZ. L. REV. 439 (1988), and Laurence's reply, *On Eurocentric Myopia, the Designated Hitter Rule, and "The Actual State of Things"*, 30 ARIZ. L. REV. 459 (1988).

16. See, e.g., *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988) (Curtis Act of 1898, until repealed by the Oklahoma Indian Welfare Act of 1936, abolished the tribal courts of the Creek Nation).

17. See the discussion of Public Law 280, *infra* Section I.C.3.

18. The classic case of treaty abrogation in Indian law is *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1902), although courts continue to find that congressional action has abrogated rights guaranteed by treaty. See, e.g., *United States v. Dion*, 476 U.S. 734, 743 (1986) (legislative history of Bald Eagle Protection Act, and express provision for permits to natives to take eagles for religious purposes, reflected Congress' belief "that it was abrogating the rights of Indians to take eagles"); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.22 (1979) ("The intent to abrogate inconsistent treaty rights is clear enough from the express terms of Pub. L. 280.");

as federally recognized entities.¹⁹ Congressional exercise of its plenary power frequently is said to be subject to the restraints of the Constitution²⁰ and the federal-Indian trust doctrine,²¹ through the mechanism

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977) ("Congress understood that it was not bound by the three-fourths consent requirement of the 1868 Treaty with the Sioux Nation.").

19. From 1954 to 1962, the most recent heyday of federal assimilationist policy, Congress passed fourteen termination acts providing for removal of federal recognition from some 110 bands and tribes. Although in theory termination legislation withdrew only federal recognition, supervision, and services, in fact the acts dissolved tribal governments and dissipated or liquidated tribal land bases. Six restoration acts in the 1970's and 1980's returned federal recognition to most of the terminated communities. Additionally, federal courts have held unlawful the termination of 21 of 40 California rancherias. *See, e.g.,* *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042 (N.D. Cal. 1988); *Smith v. United States*, 515 F. Supp. 56 (N.D. Cal. 1978). Several native bands and tribes and over one million acres of land remain unrestored. *See generally* Walch, *Terminating the Indian Termination Policy*, 25 STAN. L. REV. 1181 (1983).

House Concurrent Resolution 108, establishing in 1953 the congressional policy of terminating native tribes' "status as wards of the United States," was not repudiated by Congress until 1988. *See* H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953); H.R. Res. 427, 100th Cong., 2d Sess., 134 CONG. REC. H1707, H1792-93 (daily ed. Apr. 19, 1988).

20. In particular, the takings clause of the fifth amendment places the federal government under an obligation to pay just compensation for taking native land where native title has been recognized by treaty. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). *But see* *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987) (no takings where damage to riverbed interests was caused by government action pursuant to the overriding federal navigational servitude); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-89 (1955) ("Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation"). Oddly enough, in these latter two cases the Court spoke of its "generosity" to native nations. *Cherokee Nation*, 480 U.S. at 706 ("We think that the decision [determining tribal ownership of the riverbed pursuant to treaty] was quite generous to respondent, and we refuse to give a still more expansive and novel reading of respondent's property interests."); *Tee-Hit-Ton*, 348 U.S. at 281-82 ("[g]enerous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability"). Tribes might well dispute the Court's reading of its course of "generous" dealings with native nations.

21. The trust doctrine, the untoward outgrowth of Chief Justice Marshall's original characterization of the federal-tribal relationship as that of guardian-ward, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), binds the federal government to "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). The Supreme Court in recent years, however, has limited the utility of the trust doctrine as a restraint on congressional power. In a pair of cases, the Court appears to hold that a federal statutory and regulatory scheme establishing a fiduciary obligation regarding a specific activity is necessary before a native nation successfully can bring suit against the government for breach of trust. *United States v. Mitchell*, 445 U.S. 535, 546 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) (*Mitchell II*) (General Allotment Act creates only a "bare trust" that will not support an action for breach for mismanagement of timber lands, but federal timber management statutes and regulations comprehensively governing harvest of native timber "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities" such that the government is liable in damages for breach of those duties). Several scholars recently have challenged the long presupposed efficacy of the trust doctrine as a curb on federal power by noting the fact that raising a trust claim presupposes the legitimacy of the trust relationship. *See, e.g.,* Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND.

of judicial review.²² These restraints, however, ultimately are ineffective defenses to counter the congressional power of "complete defeasance."²³ Moreover, these restraints do not prevent Congress from acting, but only permit the subsequent remedy of money damages in selected instances.²⁴

RES. J. 3, 65 (1987); Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 CATH. U.L. REV. 635, 682 (1982).

22. In *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), the Court referred to "the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review. That view, of course, has long since been discredited in taking cases, and was expressly laid to rest in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 . . . (1977)." *Sioux Nation*, 448 U.S. at 413 (footnote omitted). Professor Newton notes that the mere fact of judicial review of congressional actions represents a significant "narrowing" of the plenary power doctrine. Newton, *supra* note 15, at 231. Professor Wilkinson asserts in a similar vein that recent Supreme Court "opinions have reconceptualized aspects of federal power over Indian property rights, narrowed it, and rendered the term *plenary* (as a synonym for absolute and unreviewable) obsolete." C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 79 (1987).

Wilkinson's prognostication that the opinions he references "may well become reasonably imposing edifices in this field," standing as "polite but firm warnings to Congress that care must be taken in-house," *id.* at 82, is disconcerting. Even granting the frequently acknowledged check on congressional taking of treaty-recognized property rights without fifth amendment compensation, no similar check exists for United States governmental "taking" of most things "aboriginal"—neither land, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); self-government, *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979); nor culture, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). Judicial checking power of congressional interests in Indian affairs, other than for fifth amendment takings, is gossamer. Moreover, contrary to the entirety of Wilkinson's thesis that the judiciary has been "principled, even courageous" as a modern savior to native interests, C. WILKINSON, *supra*, at 4, the Supreme Court itself arguably is the current primary wielder of a plenary authority adverse to native interests. See Ball, *supra* note 21, at 57-58; Royster & Fausett, *Fresh Pursuit onto Native American Reservations: State Rights "to Pursue Savage Hostile Indian Marauders Across the Border"*—*The Limits of State Intrusion into Tribal Sovereignty*, 59 U. COLO. L. REV. 191, 263-81 (1988). See generally Kramer, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989.

23. See *supra* note 15.

24. Classic to this point is the celebrated unlawful taking of the Black Hills—the sacred center of the Dakota (Sioux) Nation. The native pursuit of elusive American justice since the congressional theft of these sacred lands in 1877 has required four special acts of Congress, the longest running federal court battle in United States history, nearly \$11 million in attorney's fees, and more than 100 years of waiting. In 1980, the Supreme Court affirmed the largest native land claims damages judgment ever: \$105 million in value and interest for seven million acres, including the Black Hills, admitting that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 388 (1980) (quoting *United States v. Sioux Nation*, 207 Ct. Cl. 234, 241, 518 F.2d 1298, 1302 (1975)).

Five of the eight tribes party to the litigation, including the largest tribe, the Oglala Lakota, consistently have refused to accept payment for their birthright or to participate with the Department of the Interior in planning the distribution of the judgment, now worth over \$200 million. The award of "just" compensation, while vindicating their legal right, merely

2. *The Tuscarora Rule*

At least through the nineteenth century, the Supreme Court adhered to the rule that general federal laws, like state laws, were not applicable to natives within Indian country.²⁵ Despite these early unequivocal pronouncements, the Court held in *Federal Power Commission v. Tuscarora Indian Nation*²⁶ that, absent a treaty or federal statute to the contrary, federal laws of general applicability apply also to natives and native tribes.²⁷

The *Tuscarora* Court drew this rule almost exclusively from three of its earlier decisions.²⁸ Oddly, all three were tax cases: two of these opinions concerned the applicability of the federal income tax to natives, and the third addressed the applicability of state inheritance taxes to Oklahoma natives. A long-standing rule in tax law, however, provides that "to be valid, exemptions to tax laws should be clearly expressed."²⁹ Thus, in the tax cases cited by the Court in *Tuscarora*, the requirement of express exemptions in tax law had been permitted to override competing native interests. In *Tuscarora* itself, the Court took that tax rule and applied it wholesale to general federal legislation.³⁰

perpetuated an heinous cultural wrong. Adams, *Whose Land Is It Anyway?*, Nat'l L.J., Aug. 3, 1987, at 21.

Senators Bill Bradley and Daniel Inouye have sponsored in each of the last two Congresses the Sioux Nation Black Hills Act to return 1.3 million acres of federally controlled lands in and around the Black Hills to the rightful owners. See King, *Bradley Offers Measure to Return Sioux Land*, N.Y. Times, Mar. 11, 1987, at Y17. For recent accounts of the Dakota Nation travail in this issue, see generally Adams, *supra*; Carrels, *Sioux Demand the Black Hills*, High Country News, Feb. 15, 1988, at 10; Greider, *The Heart of Everything That Is*, ROLLING STONE MAG., May 7, 1987, at 37.

25. "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins*, 112 U.S. 94, 100 (1884); see also *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *Ex parte Crow Dog*, 109 U.S. 556, 570 (1883).

One notable exception arose in the case of *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871), in which the Court held that a general federal excise tax abrogated a specific provision of the Cherokee treaty guaranteeing the tribe a tax exemption on all products sold outside the reservation. A dozen years later, the Court refused to follow *The Cherokee Tobacco*, and held that federal laws must be construed to conform to treaty provisions wherever possible. *United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496, 497-98 (1883).

26. 362 U.S. 99 (1960).

27. "However that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116; see also *Squire v. Capoean*, 351 U.S. 1, 6 (1956).

28. *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691 (1931); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943).

29. *Squire*, 351 U.S. at 6; see also *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 93 (1934); *Great N. Ry. Co. v. Minnesota*, 216 U.S. 206, 221 (1910).

30. Occasionally, laws of general applicability that otherwise arguably would apply under the *Tuscarora* rule, expressly will exempt native tribes from coverage. See, e.g., Civil Rights Act of

Whether particular treaties or federal laws are "to the contrary," thus blocking application of the general law, is, of course, a matter of judicial interpretation. The courts have moderated the harshness of the *Tuscarora* rule by employing limiting rules of application: general statutes must be interpreted in conformity with treaties wherever possible,³¹ and treaties will not be abrogated by subsequent legislation absent a clear intent on the part of Congress to do so.³² Nonetheless, a federal law of general applicability may operate to abrogate treaties with the native nations.³³ Despite a number of agency rulings and lower court decisions subsequent to *Tuscarora* that have found natives and native governments not subject to particular federal laws,³⁴ there is relatively unquestioning acceptance that most general federal laws apply in Indian country.³⁵

1964, Title VII, 42 U.S.C. §§ 2000e-2000e-17 (1982), which addresses discrimination in employment and specifically excludes native nations from the definition of employers covered by the act. *Id.* § 2000e(b).

31. *United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496 (1883):

The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.

32. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 478 n.22 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968). *But see United States v. Dion*, 476 U.S. 734, 739 (1986) (congressional intent to abrogate native treaties can be found "from clear and reliable evidence in the legislative history of a statute").

The classic survey of the canons of construction applicable to treaty abrogation is Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975).

33. *See Dion*, 476 U.S. at 745 (holding that the Bald Eagle Protection Act abrogated the Yankton Sioux treaty-reserved right to hunt within the borders of the reservation).

34. For exemplary agency rulings, see *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 93 L.R.R.M. (BNA) 1296 (1976) (Labor Management Relations Act implicitly exempts tribal timber company from definition of employer); 78 Interior Dec. 18 (1971) (Wholesome Meat Act does not authorize Secretary of Agriculture to conduct meat inspections on reservations); 78 Interior Dec. 349 (1971) (twenty-sixth amendment guaranteeing 18-year-old vote does not apply to tribal elections, although it does apply to elections called by Secretary of the Interior); Rev. Rul. 67-284, 1967-2 C.B. 55, 55, 58 (although individual natives generally are subject to federal income tax because not specifically exempted, native tribes are not taxable entities under the federal income tax statutes).

Also compare *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982) (Occupational Safety and Health Act does not apply to tribal business) *with* *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (OSHA is applicable to tribal enterprise). *See also* Note, *A Proposal for Extension of the Occupational Safety and Health Act to Indian-Owned Businesses on Reservations*, 18 U. MICH. J.L. REFORM 473 (1984-85).

35. *See, e.g., Phillips Petroleum Co. v. United States Envtl. Protection Agency*, 803 F.2d 545 (10th Cir. 1986) (Safe Drinking Water Act applies to native lands); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) (Organized Crime Control Act, although not mentioning natives, applies to individual natives operating casinos on reservation); *Davis v. Morton*, 469 F.2d 593

B. Tribal Regulatory Jurisdiction

Tribal authority to regulate in Indian country arises from the inherent sovereign powers of the native nations. Domestic courts in the nineteenth century generally recognized the separate sovereignty of native nations, despite the frequent assertion of superior sovereignty by the United States.³⁶ The last vestige of congressional recognition of native governments as truly independent sovereigns was excised in 1871 when Congress mandated an end to treaty-making with the native nations.³⁷ Nonetheless, Chief Justice Marshall's characterization of native nations as "distinct, independent political communities" remains a staple of judicial decisionmaking.³⁸

Notwithstanding the domestic relegation to "dependent sovereign" status, native nations remain independent governments with inherent "attributes of sovereignty."³⁹ Any judicial determination of the sovereign powers of a native nation begins with the doctrine that tribes retain all inherent powers of national sovereignty that have not been

(10th Cir. 1972) (National Environmental Policy Act applies to Indian country); *In re Sandmar Corp.*, 12 Bankr. 910 (Bankr. D.N.M. 1981) (Bankruptcy Code applies to native tribes as creditors). *But see* Brecher, *Federal Regulatory Statutes and Indian Self-Determination: Some Problems and Proposed Legislative Solutions*, 19 ARIZ. L. REV. 285 (1977) (advocating federal legislation limiting the *Tuscarora* rule).

36. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832):

The very term "nation," so generally applied to them, means "a people distinct from others." The [C]onstitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

See also Ex parte Crow Dog, 109 U.S. 556, 568 (1883) (noting that treaties were made to secure to the native nations, "with whom the United States was contracting as a distinct political body," the basic right of self-government).

37. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C.A. § 71 (West Supp. 1989)). Although the end of treaty making may have had more to do with the House of Representative's pique at being excluded from a voice in federal Indian policy, the Act of 1871 generally is recognized as heralding the onset of the first serious push toward assimilation of native tribes into white society. *See* Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 U. COLO. L. REV. 617, 620 n.13 (1976); Newton, *supra* note 15, at 206.

38. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *see* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *see also* *United States v. Wheeler*, 435 U.S. 313 (1978) (no double jeopardy attaches to prosecutions by both tribe and federal or state government because the prosecutions originate in separate sovereigns).

39. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (quoting *Mazurie*, 419 U.S. at 557).

ceded by treaty, excised by federal legislation, or divested by the courts as inconsistent with the federal government's assertion of superior sovereignty.⁴⁰ The domestic test for the exercise of native governmental powers thus is not whether a native nation *has* a sovereign power, but whether the tribe has lost it. The initial existence of tribal sovereign powers is presumed.

1. *Inherent Tribal Authority*

Tribal regulatory authority is preeminent over natives and native lands.⁴¹ In particular, native governments possess the right to control their internal and social affairs, "to make their own laws and be ruled by them."⁴² Tribal jurisdiction over natives may be subject to intru-

40. "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323. Under this test of retained tribal authority, native nations may continue to assert sovereignty only where the federal government—through Congress or the courts—has not usurped that power to itself. Where a tribe has lost a sovereign power by statute, the arrogation belongs to Congress under its asserted plenary power. *See, e.g.*, Curtis Act of 1898, 30 Stat. 495 (abolishing "all tribal courts in Indian Territory"); *see also supra* note 19 (discussion of the termination acts). Where a tribe loses a power by "implicit divestiture," however, the arrogation of power belongs to the courts despite the fact that plenary power is said to reside exclusively in the legislative branch. *See supra* note 15.

For examples of judicial divestiture, see *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587–88 (1823) ("discovery" and "conquest" vest absolute title in the discovering nation; native peoples have only a right of occupancy); *Worcester*, 31 U.S. (6 Pet.) at 559 (United States "irresistible power" excludes native tribes from relations with any power other than the discovering nation); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (tribes divested of right to prosecute non-natives "[b]y submitting to the overriding sovereignty of the United States"); *Montana v. United States*, 450 U.S. 544, 563–65 (1981) (tribe cannot regulate hunting and fishing by non-natives on non-native fee land because it is "beyond what is necessary to protect tribal self-government or to control internal relations" and thus "is inconsistent with the dependent status of the tribes"); *Rice v. Rehner*, 463 U.S. 713, 726 (1983) ("tribes have long ago been divested of any inherent self-government over liquor regulation . . . as a 'necessary implication of their dependent status'" (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980))).

Unlike powers lost by federal statute or "dependent status," sovereign authority divested by treaty does not involve an arrogation of power by the United States, and thus does not implicate a "lesser" status for native nations. Cession of some sovereign power, in exchange for reciprocal concessions or other benefits, is not uncommon in international treaties. *See, e.g.*, 1 D. O'CONNELL, *INTERNATIONAL LAW* 352–61 (1965).

41. *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

42. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56 (1978); *Williams v. Lee*, 358 U.S. 217, 220 (1959); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

sions of federal regulatory authority,⁴³ but generally is exclusive of state jurisdiction.⁴⁴

The territorial jurisdiction of native nations, like that of other sovereignties, customarily is limited to their land base.⁴⁵ Concomitant with this territorial circumscription, natives going off the reservation generally are subject to the full range of state and local jurisdiction.⁴⁶ However, native nations retain a limited power of jurisdiction over their members off the reservation: members engaged in the exercise of off-reservation treaty usufructuary rights remain subject to tribal hunting

43. For example, under the Indian Civil Rights Act, 25 U.S.C.A. § 1302(1), (8) (West. Supp. 1989), native nations may not regulate in ways that would prohibit the free exercise of religion, abridge freedom of speech or the press, or deprive any person of property without due process. Beyond these and other regulatory proscriptions, Congress also has vested the Secretary of the Interior with enormous intrusive control over native governments and peoples. *See generally* Title 25 of the U.S. Code (1982 & Supp. V 1987) and Part 25 of the Code of Federal Regulations (1988); *see particularly, e.g.*, 25 U.S.C.A. § 476 (West Supp. 1989) (power to review and overrule most actions of native governments, including constitutional amendments).

The exercise of this invasive federal power has not been limited to the regulatory area. *See, e.g.*, Major Crimes Act, 18 U.S.C.A. § 1153 (West Supp. 1989) (discussed *supra* note 14); *see also* 25 C.F.R. § 11.1(e) (1988) (granting Secretary of Interior approval power over tribal law and order codes).

44. "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). Thus, it is only "in exceptional circumstances [that] a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987).

45. *See, e.g.*, NAVAJO TRIB. CODE tit. 7, § 254 (Supp. 1984-85):

The Territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Tribe or any Band of Navajo Indians.

Unlike other sovereignties, however, many tribes that suffered the ravages of allotment or homesteading of their tribal land base by non-natives do not have full regulatory control of their territorial domain. The Supreme Court in *Montana v. United States*, 450 U.S. 544, 557-67 (1981), held that the Crow Tribe, as a general matter, could not regulate hunting and fishing on lands that, while within the territorial confines of the reservation, were not owned by the tribe. *See also Puyallup Tribe, Inc. v. Washington Game Dep't*, 433 U.S. 165, 173-77 (1977) (denying exclusive tribal regulatory authority over on-reservation fishing where fewer than 22 acres of the original 18,000 acres of the reservation remained in trust status); *cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

46. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

and fishing laws.⁴⁷ This off-reservation extension of personal jurisdiction over members is exclusive of state jurisdiction.⁴⁸

2. Tribal Authority Under Federal Delegation

Domestic law provides that, in addition to their inherent sovereign authority, native nations may assume regulatory authority under delegations of federal powers. Although Congress is limited in its ability to delegate its legislative powers, the limitation is less stringent where the delegation is to an entity possessing independent authority over the subject area.⁴⁹ Where Congress delegates its federal authority to native nations, the delegation is to governments possessing independent powers, particularly over internal and social affairs.⁵⁰

In virtually all instances, inherent tribal sovereignty is sufficient to support the tribal exercise of regulatory authority. Only in those rare circumstances where tribal authority previously has been divested is specific federal delegation necessary.⁵¹ Nonetheless, nothing prevents

47. *Settler v. Lameer*, 507 F.2d 231, 237 (9th Cir. 1974); *Lac Courte Oreilles Band v. Wisconsin*, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987); *United States v. Michigan*, 471 F. Supp. 192, 273-74 (W.D. Mich. 1979); *United States v. Washington*, 384 F. Supp. 312, 340-42 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir.), *cert. denied*, 423 U.S. 1086 (1975), *vacated on other grounds*, 443 U.S. 658 (1979). See generally Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C.L. REV. 743, 760 (1984); Note, *Indian Law—Tribal Off-Reservation Jurisdiction—Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974), 1975 Wis. L. REV. 1221. At least in the Pacific Northwest, this off-reservation authority is widely exercised by native tribes. Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17, 48 n.174 (1983).

48. To be exclusive, tribal laws must be effective and enforced. *Washington*, 384 F. Supp. at 340-41 (tribes meeting certain qualifications and conditions, including procedures for enforcement, identification of members, and reporting, are "relieved of state regulation" of off-reservation fishing); see also *Lac Courte Oreilles*, 668 F. Supp. at 1241-42; *Michigan*, 471 F. Supp. at 274.

49. *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975).

50. *Id.* at 557:

[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. . . . [T]he independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority "to regulate Commerce . . . with the Indian tribes."

(citation omitted).

51. One area in which native tribes are forced to depend on federal delegation is the exercise of criminal jurisdiction over non-natives. In the criminal area, the Supreme Court has ruled that native nations are divested of any criminal jurisdiction over non-natives for crimes committed within Indian country, because such jurisdiction would be "inconsistent with their status." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). Subsequent to this judicial divestiture of inherent tribal criminal jurisdiction, *id.* at 212, the 99th Congress considered a bill that would reinvest the Salt River Pima-Maricopa Indian Community with criminal

the federal government from granting, or native governments from accepting, delegations of federal authority.

The primary difficulty with federal delegations is not legal but perceptual. In every instance where tribes, with inherent powers to act, act instead under a delegation of federal authority, the perception of inherent tribal authority is diminished. A prime example may be the Indian Reorganization Act of 1934 ("IRA")⁵² which established federal authorization for native tribes to organize as governmental units and as corporate entities. Although native nations clearly had the inherent, preexisting power to form governments, those tribes with IRA governments often are perceived as governing themselves under a "grant" of authority from the federal government.⁵³

3. *Non-Natives and Their Lands Within Indian Country*

Native nations may assert regulatory authority over non-natives both on native-owned land and on lands within Indian country patented in fee to non-natives. In the former instance—tribal authority over non-natives on native land—tribal jurisdiction is exclusive of state action, at least where strong state interests are not implicated.⁵⁴

misdemeanor jurisdiction over non-natives. H.R. 4900, 99th Cong., 2d Sess. (1986); S. 2564, 99th Cong., 2d Sess. (1986). The legislation was passed by the House of Representatives, but was not reported out of the Senate Select Committee on Indian Affairs before the end of the session. Cong. Index (CCH) 35,090, 21,051 (1985–86). Had the bill been enacted into law, it would have represented a delegation of federal authority to the Salt River Community. Despite tribal and widespread federal, state, and local support for the legislation, the bill has not been reintroduced.

52. 25 U.S.C. §§ 476–477 (1982).

53. Professors Deloria and Lytle point out that the IRA initially was welcomed by many tribal members "because it ha[d] represented a step forward from the absolute prostration the tribes suffered when the federal bureaucracy preempted all social and political functions on the reservations after the passage of the General Allotment Act." V. DELORIA, JR. & C. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 14 (1984). Deloria and Lytle contend also that the "inevitable product of the [IRA] experiment in self-government" are uprisings such as that at Wounded Knee in 1973, which "represented the first effort to establish the dignity of the tribe in a manner consonant with the people's memories of their older way of life." *Id.*

Native nations, with the exception of those in Oklahoma, had the option of accepting the IRA. Many of the largest tribes, such as the Navajo, Yakima, Klamath, and Crow, as well as the eastern Iroquois confederacy of nations, chose not to do so. Other tribes, despite the superficial institutionalization of IRA governments, in reality continue to operate largely with traditional local-kinship political structures. See Champagne, *American Indian Values and the Institutionalization of IRA Governments*, 6(2) AM. INDIAN POL'Y & CULTURAL VALUES 25 (1986) (detailing, in part, the workings of the Quechan, Florida Seminole, and Northern Cheyenne tribal governments).

54. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983), the Court held that tribal jurisdiction to regulate non-native hunting and fishing on tribal lands was exclusive. In finding state authority preempted, the Court relied in part on the fact that the resource use implicated no state governmental services and created no spillover effect off the reservation. *Id.*

In particular, where state regulation of the non-native conduct on native lands would disrupt a tribal regulatory scheme, tribal jurisdiction precludes additional state regulation.⁵⁵

In the second instance, where the non-native activities occur on non-native land, the Supreme Court has established a general presumption that native nations do not have regulatory authority.⁵⁶ This "general proposition," however, is riddled with such significant exceptions that only in rare instances have tribes been barred from regulating the conduct of non-natives. In essence, the "general proposition" becomes a rebuttable presumption that tribal jurisdiction is lacking. If a tribe can show that the activities implicate one of the exceptions, tribal authority over non-natives then may be exercised.

at 341-43. The Court noted that its decision two years earlier in *Montana v. United States*, 450 U.S. 544 (1981), which held that the state could regulate non-native hunting and fishing on non-native fee lands within the reservation, offered no resolution to the issue in *Mescalero*:

Unlike this case, *Montana* concerned lands located within the reservation, but *not* owned by the Tribe or its members. . . . But as to "land belonging to the Tribe or held by the United States in trust for the Tribe," we "readily agree[d]" that a Tribe may "prohibit nonmembers from hunting or fishing . . . [or] condition their entry by charging a fee or establish bag and creel limits."

Mescalero, 462 U.S. at 330-31 (quoting *Montana*, 450 U.S. at 557) (emphasis in original).

55. Tribal authority over the reservation activities of non-natives would have a "rather hollow ring" if a tribe's regulatory powers were co-opted by an equivalent or more restrictive state regulatory scheme. *Mescalero*, 462 U.S. at 338.

It is important to emphasize that concurrent jurisdiction would effectively nullify the Tribe's authority to control hunting and fishing on the reservation. Concurrent jurisdiction would empower [the state] wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources. The Tribe would thus exercise its authority over the reservation only at the sufferance of the State.

Id. In *Mescalero*, a comprehensive system of tribal fish and game laws, licenses, and management plans, coupled with extensive and lengthy cooperative efforts with federal fish and wildlife specialists, preempted any concurrent state regulatory scheme that would "disturb and disarrange" the integral tribal/federal efforts. *Id.* at 338-39. Moreover, here the tribe had "engaged in a concerted and sustained [economic] undertaking," and the state threatened "Congress' overriding objective in encouraging tribal self-government and economic development" by asserting concurrent jurisdiction. *Id.* at 341; accord *United States v. Sohappy*, 770 F.2d 816, 819 n.4 (9th Cir. 1985); *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n*, 588 F.2d 75, 77 (4th Cir. 1978), *cert. dismissed*, 446 U.S. 960 (1980). On the conflicts inherent to concurrent tribal and state on-reservation regulation, see *Woodbury, New Mexico v. Mescalero Apache Tribe: When Can a State Concurrently Regulate Hunting and Fishing by Nonmembers on Reservation Lands?*, 14 N.M.L. REV. 349 (1984); Comment, *New Mexico v. Mescalero Apache Tribe: Dueling Sovereigns—When State and Tribe Clash*, 11 OHIO N.U.L. REV. 439 (1984).

56. *Montana v. United States*, 450 U.S. 544, 565 (1981).

Tribes may exercise regulatory jurisdiction over non-natives, even on non-native fee land, in two broad instances.⁵⁷ The first of these is where the non-natives enter into consensual dealings with the tribe or its members.⁵⁸ The most common regulatory power that native nations exercise over non-natives in such situations is the power to tax. The Supreme Court repeatedly has recognized the inherent sovereign power of tribes to impose taxes on nonmembers doing business on the reservation.⁵⁹ The second instance of tribal authority over non-natives is where the non-native activities impact the health and welfare of the tribe, or its economic or political security.⁶⁰ Under this broad recognition of tribal sovereign rights, lower courts have affirmed tribal rights to subject non-natives on non-native fee land to tribal building, health, and safety codes,⁶¹ tribal regulation of the exercise of riparian rights,⁶² and tribal sewer hook-up requirements.⁶³ In particular, courts consistently have recognized tribal zoning powers over non-native lands within Indian country.⁶⁴

Only where state involvement in the regulated activity is particularly strong, and the courts find that none of the exceptions is relevant,

57. *Id.* The Court found the tribal right to regulate in these instances to be exceptions to "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."

58. *Id.* ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."); see also *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 147 (1982) (noting that a tribe's sovereign power to exclude non-members "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct, such as a tax on business activities conducted on the reservation. . . . [T]he nonmember's presence and conduct on Indian lands are conditioned by the limitations the tribe may choose to impose.").

59. *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

60. *Montana*, 450 U.S. at 566. These exceptions are drawn to recognize the right of indigenous peoples to protect their sovereign interests. As separate sovereigns, each native nation has particular interests in such basic concerns of dominion as "the political integrity, the economic security, or the health and welfare" of the nation. Where these sovereign interests are present, non-natives may not escape tribal regulation simply because they are not citizens of the tribal state.

61. *Cardin v. De La Cruz*, 671 F.2d 363, 367 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

62. *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982).

63. *Lummi Indian Tribe v. Hallauer*, 9 Indian L. Rep. 3025 (W.D. Wash. 1982).

64. See, e.g., *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), *cert. granted sub nom. Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 108 S. Ct. 2843 (1988); *Knight v. Shoshone & Arapaho Indian Tribes*, 670 F.2d 900 (10th Cir. 1982); *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042 (N.D. Cal. 1988); *Colville Confederated Tribes v. Cabenham Forest Indus.*, 14 Indian L. Rep. 6043 (Colv. Tr. Ct. 1987).

will native nations be prohibited from regulating non-native activities on non-native land in Indian country. For example, in a rare rejection of tribal authority, the Supreme Court held that the Crow Tribe was without jurisdiction to regulate hunting and fishing by non-natives on non-native fee lands within the boundaries of the reservation.⁶⁵ The Court concluded that since non-native hunters and fishers on non-native fee lands did not enter into dealings with the tribe and did not "threaten the Tribe's political or economic security," tribal regulation of the non-natives was barred.⁶⁶ The Court offered no explanation for its assertion that control of resources within the boundaries of the reservation did not implicate tribal concerns.

C. State Regulatory Jurisdiction

State assertions of authority stem primarily from the refusal of the states to perceive Indian country as extraterritorial to state borders. In the early years of the Republic, when native sovereign status generally was acknowledged under domestic law, the Supreme Court ruled that state laws had no force or effect in native territory.⁶⁷ Beginning in the late 1800's, however, the Court decided a long series of cases, involving state authority over both natives and non-natives, that eroded the inviolability of tribal dominions.⁶⁸ Although the "concep-

65. *Montana v. United States*, 450 U.S. 544 (1981). The Court specified that approximately 28% of the reservation was owned in fee by non-natives, and that the state stocked the waters of the reservation with fish and stocked some of the game on the reservation. *Id.* at 548. In addition, the state traditionally had exercised "near exclusive" jurisdiction over non-native hunting and fishing on fee lands, a situation to which the parties had accommodated themselves. *Id.* at 564 n.13. Moreover, the tribal regulations prohibited all hunting and fishing within the reservation by any person not a member of the tribe. *Id.* at 549.

66. *Id.* at 566. The Court has recognized, however, the sovereign interest in controlling the same activities by non-natives on tribal lands. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (discussed *supra* notes 54-55 and accompanying text).

67. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832):

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.

68. Typical examples include *United States v. McBratney*, 104 U.S. 621 (1881) (states have jurisdiction over crimes committed by one non-native against another non-native in Indian country); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (state action may be permitted unless it "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them"); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973) (pronouncing a "trend" away from "platonic notions" of tribal sovereignty as a barrier to state jurisdiction, and an increasing reliance on federal preemption to bar state incursions); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (native tribes have no inherent criminal jurisdiction over non-native defendants); *Montana v. United States*, 450 U.S. 544 (1981) (discussed *supra* notes 56-58, 60, 65-66, and

tual clarity” of the early absolute bar to state authority thus has been abandoned,⁶⁹ a presumption still runs against the application of state laws within reservation borders.⁷⁰

1. *The Infringement/Preemption Test*

The initial articulations of the modern test for state regulatory jurisdiction appeared in the 1950's. In the landmark case of *Williams v. Lee*, addressing civil court jurisdiction over native defendants involved in an on-reservation transaction, the Supreme Court ruled that unless Congress had decreed otherwise, state action was barred if it infringed on the tribal right of self-government.⁷¹ By 1980, the *Williams* infringement test had been relegated to one half the current analytical test for the validity of state authority in Indian country. This modern analysis, known as the “infringement/preemption” test, bars state jurisdiction if it either infringes on tribal sovereignty or is preempted

accompanying text); *Rice v. Rehner*, 463 U.S. 713 (1983) (retail liquor establishments on reservations, even when operated by tribal members, are subject to state liquor license requirements); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (applying the infringement/preemption test from *Williams* and *McClanahan* to assertions of direct state authority over native tribes); see also Comment, *Evolution, Assimilation, and State Control of Gambling in Indian Country: Is Cabazon v. California an Assimilationist Wolf in Preemption Clothing?*, 24 IDAHO L. REV. 317, 326–31 (1987–88).

Civil court jurisdiction appears to be the only area of law that consistently has escaped increasing intrusions by state governments. Disputes arising in Indian country and involving a native defendant cannot be adjudicated in state court because state court jurisdiction would interfere with tribal sovereignty. *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959). The preclusion of state court jurisdiction only applies, however, to a state without Public Law 280 or other specific congressional delegation of jurisdiction. Where a reservation is subject fully to Public Law 280, state courts may adjudicate civil disputes arising in Indian country. See *infra* note 98–99 and accompanying text.

69. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). As the Court noted in 1959: “Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained.” *Williams v. Lee*, 358 U.S. 217, 219 (1959).

70. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) (state jurisdiction over natives is permissible only “in exceptional circumstances”); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (“[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable”). But see *supra* notes 56–66 and accompanying text (discussion of *Montana v. United States*).

71. 358 U.S. 217, 220 (1959) (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

The Court's test was considerably more deferential to asserted state jurisdiction than a contemporaneous statement by the Interior Department, the federal agency charged with administering domestic Indian policy and law. “State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.” U.S. DEPT OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958).

by federal law.⁷² Even before the infringement/preemption test was fully articulated in the regulatory cases, however, the Supreme Court had begun positing a "shift in emphasis" or a "trend away from" the infringement barrier and toward federal preemption.⁷³ Today, in the regulatory context, the infringement barrier has been all but abandoned.⁷⁴

To resolve conflicting sovereign assertions of regulatory jurisdiction in Indian country, domestic courts now focus almost exclusively on federal preemption, but a special type of federal preemption unique to Indian law.⁷⁵ The current preemption analysis⁷⁶ begins with a deter-

72. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Supreme Court combined the separate threads of the *Williams* infringement test and the preemption test from *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), to posit "two independent but related barriers" to state jurisdiction:

First, the exercise of such [state] authority may be preempted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation. *White Mountain Apache Tribe*, 448 U.S. at 142-43 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

73. The "trend" toward dominance of the preemption prong was premised in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); see also *Rice v. Rehner*, 463 U.S. 713, 718 (1983).

74. For example, in *Rice v. Rehner*, 463 U.S. 713 (1983), the Court engaged in a lengthy and detailed preemption analysis, concluding that state licensing of on-reservation liquor vendors was not preempted by federal law. As for the infringement barrier, which theoretically served also as an independent bar to state jurisdiction, the Court stated summarily: "Regulation of sales to non-Indians or nonmembers of the Pala Tribe simply does not 'contravene the principle of tribal self-government'" *Id.* at 720-21 n.7 (citation omitted). In the regulatory area no recent major case has prohibited state jurisdiction exclusively on the ground that the state action would infringe impermissibly on tribal sovereignty. For other criticisms that the "independent" infringement test has been collapsed into the preemption test, and that the Court now engages only in a balancing test of tribal, federal, and state interests, see Barsh, *Is There Any Indian Law Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863, 866-67 (1984); Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 OR. L. REV. 667, 678 (1986).

Interference with tribal sovereignty remains, however, the primary test for the exercise of state court jurisdiction over civil disputes. See *supra* note 68; see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) ("If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.").

75. In its usual sense, "federal preemption" refers to federal statutory preemption of state law. In this federalism context, preemption is the exception and not the rule. The federal law must expressly preempt state law or occupy the field so that no room remains for state law. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). In domestic Indian law, the presumption runs not in favor of the state, as it does in the classic preemption analysis, but in favor of federal preemption of state regulation.

Although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, . . . our cases have rejected a narrow focus on congressional intent to preempt state law as the sole touchstone. They have also rejected the

mination of the “backdrop” of tribal sovereignty.⁷⁷ This backdrop inquiry is focused on broad-based concepts of self-government, rather than any particularized notion of specific tribal powers.⁷⁸ In addition to tribal sovereignty itself, the backdrop inquiry also now includes an examination of federal policies promoting native self-government.⁷⁹

proposition that preemption requires “‘an express congressional statement to that effect.’” State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–34 (1983) (citations omitted).

76. The most recent articulation of the preemption test appears in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987):

“State jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its “overriding goal” of encouraging tribal self-sufficiency and economic development.

(quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)).

77. *Cabazon*, 480 U.S. at 216.

78. In the penultimate statement of the preemption test, the Court employed, for the first time, an extremely narrow vision of tribal sovereignty. *Rice v. Rehner*, 463 U.S. 713 (1983). The issue in *Rice* was whether the state could impose its licensing requirements upon an on-reservation retail liquor establishment. The Court held that state licensing was not preempted, in part because “tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.” *Id.* at 722. Prior to the *Rice* decision, the Court’s inquiry into the “backdrop” of tribal sovereignty never had required the tribe to demonstrate such a particularized exercise of tribal powers.

In *Cabazon*, however, despite the dissenting justices’ note that the tribe “has no tradition or special expertise in the operation of large bingo parlors,” 480 U.S. at 226 (Stevens, J., dissenting), the Court found that the general background of tribal sovereign interests in economic development and self-sufficiency supported federal preemption. *Id.* at 221–22. The majority dissociated itself from the *Rice* eccentricity, without needing to overrule that case or expressly to limit it to its facts, by claiming that *Rice* was based on a traditional *federal* intent to involve states in liquor regulation on reservations. *Id.* at 220. The Court’s return to broad-based notions of sovereignty is fortuitous since the casuistry of the *Rice* articulation is exposed by the dissent in *Cabazon*, quoted above. Would a tradition of operating *small* bingo parlors not be sufficient? What about a tradition of other types of gaming? The absurd minutiae of such a narrow inquiry led the Court in *Cabazon* to jettison the *Rice* formulation before much damage could be done. For criticism of the *Rice* test, see generally Mikkanen, *Rice v. Rehner: A Limitation on the Exercise of Tribal Governmental Powers Based on Historical Factors?*, 9(2) AM. INDIAN J. 2 (1986).

79. In *Rice*, as well as in the cases preceding that decision, the “backdrop” consisted solely of tribal sovereignty. 463 U.S. at 719–20; see also *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 172 (1973). The Court in *Cabazon*, however, stated that its preemption inquiry “is to proceed in light of traditional notions of Indian sovereignty *and* the congressional goal of Indian self-government.” 480 U.S. at 216 (emphasis added).

In 1980, tribal sovereignty was posited as an independent barrier to state regulation. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). By 1983, the judicial pretense that tribal sovereignty provided more than a “backdrop” to the second barrier of federal preemption was all but gone. *Rice*, 463 U.S. at 718–20. Now, tribal sovereignty has been reduced beyond that, to only one aspect of the backdrop component. Even tribal self-government as a backdrop is not permitted to stand alone. Moreover, the wedding of federal policies to concepts of native

Against this backdrop, courts engage in balancing the federal, tribal, and state interests implicated by the state regulatory effort.

Under this preemption test, state regulatory authority will be permitted if it does not interfere with federal and tribal interests, as determined by federal law, or, even if state action does interfere, if the state interests at stake are sufficient to justify the intrusion.⁸⁰ Where the state seeks to regulate natives and native activities, a presumption of interference with tribal sovereignty arises, and state interests may overcome that presumption only in "exceptional circumstances."⁸¹

In the recent Supreme Court case, *California v. Cabazon Band of Mission Indians*,⁸² the Band argued that the infringement/preemption test was inapplicable to state assertions of authority over native activities.⁸³ The Band posited that because the state regulations at issue were imposed directly on the tribe, and because no express congressional authorization of the state action could be found, the state regulations should be barred "without more."⁸⁴

Essentially, the Band's argument followed the jurisdictional lines for state criminal and civil jurisdiction over natives. State civil and criminal jurisdiction over natives are barred absent a grant of jurisdiction from Congress, such as that contained in Public Law 280.⁸⁵ There does not appear to be any satisfactory explanation why these types of state jurisdiction are prohibited absent a congressional grant, while state regulatory jurisdiction over natives may be permissible under the

self-government to determine the backdrop of tribal sovereignty necessarily pretends an alignment of the two to the derogation of true tribal self-determination and sovereignty. See, e.g., *Moapa Band of Paiute Indians v. Dep't of Interior*, 747 F.2d 563 (9th Cir. 1984) (divergent tribal and federal interests in reservation brothels as an economic development measure).

80. *Cabazon*, 480 U.S. at 216; see also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

81. *Cabazon*, 480 U.S. at 215 (quoting *Mescalero Apache*, 462 U.S. at 331-32).

Neither the exceptional circumstances test nor the infringement/preemption analysis is applicable in the tax area. After 12 years of applying the infringement/preemption test to assorted state taxes imposed on natives, and repeatedly holding those taxes preempted, the Court in *Cabazon* declared in dicta "a *per se* rule" that state taxation "of Indian tribes and tribal members" is barred unless expressly permitted by Congress. 480 U.S. at 215 n.17. Highlighting that tax is a "special area" of domestic Indian law, however, the Court refused to carry this reasoning over to other types of state regulatory jurisdiction.

82. 480 U.S. 202 (1987).

83. *Id.* at 215. The tribe's position was in accord with both the tax cases and the line of cases upon which the *Cabazon* Court relied for its analytical structure distinguishing between criminal and regulatory laws of the state, *id.* at 209-10, and that uniformly found state jurisdiction over native tribes barred once the law was determined to be regulatory. See discussion *infra* notes 108 & 110.

84. *Cabazon*, 480 U.S. at 215.

85. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 78; see *infra* Section I.C.3.

infringement/preemption test. One possible reason—though by no means a justification—is simply that Congress has acted with regard to civil and criminal jurisdiction. With the passage of Public Law 280, Congress provided a bright line dividing states entitled to exercise civil and criminal jurisdiction and those barred from doing so. The relative simplicity of determining state civil and criminal jurisdiction by reference to Public Law 280 is lost when courts are faced with assertions of state regulatory jurisdiction. If state civil and criminal jurisdiction are barred absent a grant of authority from Congress, however, no principled reason exists why the same is not true of regulatory jurisdiction.⁸⁶

In *Cabazon*, the Band urged the Supreme Court to adopt a similar approach and prohibit state regulatory jurisdiction over natives absent express congressional consent.⁸⁷ The Court disagreed in principle, however, concluding instead that states may regulate the on-reservation activities of natives “in exceptional circumstances.”⁸⁸ The Court did not integrate the exceptional circumstances test into the infringement/preemption analysis, but apparently the former standard demonstrates that state interests in exerting regulatory authority over natives or native activities will outweigh tribal and federal interests only in exceptional circumstances. Although such “exceptional circumstances” have been found rarely⁸⁹ the Court did native nations a profound injustice in compelling the use of infringement/preemption

86. This simple proposition, obvious when the several types of jurisdiction are considered together, was the approach advocated in the 1950's. See *supra* note 71. The demise of the earlier straightforward, conceptually clear approach unquestionably has been deleterious for native sovereign interests.

87. 480 U.S. at 215.

88. *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983)).

89. The only “exceptional circumstance” that was cited by the Court in *Mescalero Apache* was state authority over on-reservation treaty rights to hunt, fish, and gather. 462 U.S. at 332 n.15. In that context, the state is entitled to enforce against natives on the reservation those state laws that are reasonable and necessary for conservation of the species. *Puyallup Tribe, Inc. v. Washington Game Dep't.* 433 U.S. 165, 176–77 (1977). State authority in this “exceptional circumstance” is not absolute, however, because state regulations can be preempted by effective tribal self-regulation. See *supra* note 48 and accompanying text.

A further “exceptional circumstance” apparently is the licensing of liquor establishments. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Court concluded that state liquor license laws are applicable to individually owned retail establishments, even those operated by tribe members, located on a native reservation. The Ninth Circuit subsequently extended the rule of *Rice* to permit the State of Washington to license retail liquor stores owned and operated by native tribes themselves. *Squaxin Island Tribe v. Washington*, 781 F.2d 715 (9th Cir. 1986); see also *Op. Att'y Gen. Wis.* 19-87 (April 17, 1987) (positing that tribal hotel and convention center is subject to state liquor licensing). Nothing in these decisions permitting state licensure, of course, detracts from a tribe's inherent or delegated powers to impose its own licensing scheme on liquor establishments. See, e.g., *id.* (Oneida Nation had already issued a tribal liquor license to the enterprise); 18 U.S.C. § 1161 (1982) (authorizing tribes to adopt liquor laws “in conformity with” those of the state).

analysis to determine the validity of future state assertions of direct regulatory authority over native tribes and their citizens.

2. *State Jurisdiction over Non-Natives and Non-Native Land*

States assert more extensive regulatory authority over non-natives and non-native lands within Indian country than over native persons and property.⁹⁰ In *Montana v. United States*,⁹¹ the Supreme Court pronounced a “general proposition” in favor of state jurisdiction over non-natives, but one sharply limited by broad areas of tribal sovereign powers.⁹² Under the *Montana* test for regulatory jurisdiction over non-natives within Indian country, tribal authority is exclusive when non-natives have placed themselves within the tribal regulatory sphere or where native sovereign interests are implicated.⁹³ State jurisdiction is exclusive either where it does not impact tribal sovereign interests or where such tribal interests are not acknowledged by the courts.⁹⁴ Although domestic courts are more likely to find no impact on tribal interests where the non-native activities occur on non-native fee lands,⁹⁵ judicially recognized tribal regulatory powers over non-natives within Indian country render instances of exclusive state jurisdiction infrequent.⁹⁶ On occasion state jurisdiction over non-natives may be concurrent with tribal authority; joint regulation is the excep-

90. For example, while states generally now accept that they may not tax natives or native interests within Indian country, *see supra* note 81, they continue to assert taxing power over non-natives engaged in business activities on reservations. *See, e.g.,* *Cotton Petroleum v. New Mexico*, 109 S. Ct. 1698 (1989) (upholding state oil and gas taxes on non-native producer located on native lands within reservation); *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987) (invalidating state severance tax on coal belonging to tribe but mined by non-native lessee), *aff'd mem.*, 108 S. Ct. 685 (1988).

State assertions of special authority over non-natives are by no means limited to the taxing power. *See, e.g.,* 72 Op. Att’y Gen. Wis. 54 (1983) (state has authority to regulate groundwater contamination on non-native fee lands within reservation, but not on native lands unless spillovers onto non-native lands pose “an immediate danger to public health, safety or the general welfare”). *But see* 1982–83 Op. Att’y Gen. Ore. 169 (1983) (Umatilla Tribes have exclusive authority to apply land use code to all lands, native and non-native, within boundaries of the “diminished reservation”).

91. 450 U.S. 544 (1981).

92. *Id.* at 565–66; *see also supra* notes 56–66 and accompanying text.

93. *See supra* Section I.B.3.

94. *See generally* *Montana v. United States*, 450 U.S. 544 (1981) (discussed *supra* notes 65–66 and accompanying text).

95. *Compare* *Montana*, 450 U.S. 544 (exclusive state jurisdiction over non-native hunting and fishing on non-native fee land within reservation) *with* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (exclusive tribal jurisdiction over non-native hunting and fishing on tribal lands).

96. *See supra* Section I.B.3.

tion, however, since it generally creates impermissible “mutual dislocations” in both regulatory schemes.⁹⁷

3. *The Effect of Public Law 280*

In some instances, Congress has granted specific authority to the states to exercise civil and criminal jurisdiction in Indian country.⁹⁸ The primary grant of such jurisdiction, and the paramount means by which states currently may take civil or criminal jurisdiction, is Public Law 280.⁹⁹ Enacted in 1953, Public Law 280 required several states to

97. Concurrent jurisdiction is most likely in the area of taxation, particularly taxation of a product produced off the reservation and brought into Indian country for resale. *Compare* *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (both tribe and state may tax on-reservation cigarette purchases by non-natives) *with* *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988) (state cannot impose severance tax on tribal coal mined by non-native lessee, in part because the coal is a product generated on the reservation in which the tribe has a strong interest).

To a great extent, concurrent taxation of off-reservation products is tolerated because such dual sovereign taxation—unlike dual regulatory schemes—does not create “mutual dislocations.” *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 730 (10th Cir. 1980) (distinguishing dual taxation from dual regulation), *vacated and remanded*, 450 U.S. 1036 (1981), *on remand*, 677 F.2d 55 (10th Cir. 1982) (reaching same result), *aff'd*, 462 U.S. 324 (1983); *see also Colville*, 447 U.S. at 158 (“There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other.”). By contrast, courts generally acknowledge that dual sovereign regulation may permit one government to supplant the sovereign prerogatives of the other. *See supra* note 55.

98. The various tests for state jurisdiction within Indian country, particularly in their earlier incarnations, generally find at least a presumption against state jurisdiction absent “governing Acts of Congress.” *Williams v. Lee*, 358 U.S. 217, 220 (1959). In the criminal and civil court arenas, Public Law 280 is such a “governing act.”

99. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, as amended by the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 78. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

The civil provision of the Act is codified at 28 U.S.C. § 1360 (1982), and grants to the affected states “jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country” The criminal provision is codified at 18 U.S.C. § 1162 (1982), and grants to the affected states “jurisdiction over offenses committed by or against Indians in the [enumerated] areas of Indian country.” Both the civil and criminal grants of jurisdiction contain express disclaimers that Public Law 280 does not confer on the states any rights to alienate, encumber, or tax trust property or to regulate trust property inconsistent with treaties or other federal laws. 28 U.S.C. § 1360(b) (1982); 18 U.S.C. § 1162(b) (1982).

Any state now wishing to assume civil or criminal jurisdiction over Indian country must comply with Public Law 280 as amended by the Indian Civil Rights Act. 25 U.S.C. §§ 1321–1322 (1982 & Supp. V 1987); *Kennerly v. District Court*, 400 U.S. 423 (1971). Some states, however, had taken jurisdiction over selected reservations pursuant to special congressional grants of jurisdiction prior to the enactment of Pub. L. 280: New York, 25 U.S.C. §§ 232–233 (criminal and civil jurisdiction over all reservations); Iowa, 62 Stat. 1161 (limited criminal jurisdiction over Sac & Fox Reservation); Kansas, 18 U.S.C. § 3243 (limited criminal jurisdiction); North Dakota, 60 Stat. 229 (criminal jurisdiction over Devil’s Lake Reservation). At least one state, North Carolina, asserts jurisdiction under a treaty. *In re McCoy*, 233 F. Supp. 409, 412 (E.D.N.C. 1964) (“since the treaty of New Echota of 1835, 7 Stat. 478, the State of

take civil and criminal jurisdiction over all or most native reservations within the states' borders,¹⁰⁰ and made provisions for other states to assume the same jurisdiction at their option.¹⁰¹ Native anger over the lack of provision for tribal consent led to amendments in 1968 providing that state jurisdiction could no longer be assumed without tribal consent.¹⁰² The same amendments permitted states with Public Law 280 jurisdiction to retrocede it to the federal government.¹⁰³

North Carolina has exercised jurisdiction over criminal offenses committed by Indiana [sic] on the Cherokee Indian reservation" in that state). In addition, states may have "residuary jurisdiction" that permits, for example, a native to bring suit against a non-native in state court. *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 148-50 (1984).

Most newly "recognized" tribes, and most tribes freshly "restored" to federal recognition from the brutal exile of termination, are only accorded recognition subject to a state jurisdictional scheme "as if" the state had assumed Public Law 280 jurisdiction over the tribe. *See, e.g.*, Pub. L. No. 100-89, §§ 105(f), 206(f), 101 Stat. 666, 671-72 (1987) (Texas jurisdiction over the newly restored Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes); 25 U.S.C. § 766(b) (Supp. V 1987) (Utah jurisdiction over the recently restored Paiute Bands). Lastly, as a result of land settlement claims, several states have been accorded criminal and civil court jurisdiction over reservations resulting from the settlements. *See, e.g.*, *Wampanoag Indian Claims Settlement Act*, 25 U.S.C.A. § 1771 (West Supp. 1989) (mandating Massachusetts jurisdiction); *Rhode Island Indian Claims Settlement Act*, 25 U.S.C. §§ 1701, 1708 (Supp. V 1987) (mandating state jurisdiction over the Narragansett); *Mashantucket Pequot Indian Land Claims Settlement*, 25 U.S.C.A. § 1755 (West Supp. 1989) (mandating Connecticut jurisdiction).

100. The initial mandatory states were California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. 18 U.S.C. § 1162(a) (1982); 28 U.S.C. § 1360(a) (Supp. IV 1986). Alaska was added in 1958 by the enactment of Pub. L. No. 85-615, 72 Stat. 545 (1958).

It is more accurate to speak of Public Law 280 reservations than Public Law 280 states, because many states that exercise Public Law 280 jurisdiction do so only over selected reservations. For the sake of brevity, however, this Article will refer to Public Law 280 states as denoting those states that exercise some or all Public Law 280 jurisdiction over some or all reservations within their borders.

101. States without disclaimer clauses in their constitutions were authorized to enact enabling legislation to assume jurisdiction under Public Law 280. Pub. L. No. 83-280, § 7, 67 Stat. 590 (repealed 1968). States with disclaimer clauses were authorized to amend existing statutes and, where necessary, their constitutions "to remove any legal impediment to the assumption of civil or criminal jurisdiction." *Id.* at § 6 (codified as amended at 25 U.S.C. § 1324 (1982)).

102. 25 U.S.C. § 1321 (1982) (criminal jurisdiction); *id.* § 1322 (civil jurisdiction). These amendments were part of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982).

103. 25 U.S.C. § 1323 (1982). Only states are authorized to retrocede Public Law 280 jurisdiction. Not only may tribes not initiate such action, there is not even a mechanism to take account of tribal preferences. In fact, tribal consent to retrocession is not required.

Several states initially mandated to assume jurisdiction have since retroceded jurisdiction to the federal government. *See, e.g.*, 35 Fed. Reg. 16,598 (1970) (Nebraska's retrocession of jurisdiction over the Omaha Reservation); 51 Fed. Reg. 24,234 (1986) (criminal jurisdiction over the Winnebago Reservation); 46 Fed. Reg. 2195 (1981) (Oregon's retrocession of criminal jurisdiction over the Umatilla Reservation); 41 Fed. Reg. 8516 (1976) (Wisconsin's retrocession of jurisdiction over the Menominee Reservation). Some states that initially assumed the optional jurisdiction also have retroceded their jurisdiction. *See, e.g.*, Nevada's assumption of jurisdiction, NEV. REV. STAT. § 328.350 (1987), and subsequent retrocession over all reservations within that state, and Washington's retrocession of criminal jurisdiction over the Colville Reservation, 52

In all, eleven states presently exercise some configuration of Public Law 280 jurisdiction over at least some native reservations within their borders.¹⁰⁴ The jurisdiction over Indian country assumed by Public Law 280 states is coextensive with the jurisdiction those states exercise elsewhere within their borders. Civil and criminal jurisdiction over tribal members that formerly was exercised exclusively by the tribe now is exercised concurrently by the state.¹⁰⁵ For those tribes affected by Public Law 280, the Act accordingly operates as a partial abrogation of tribal sovereignty.¹⁰⁶

Public Law 280 affected only civil and criminal jurisdiction, however, and did not confer on the states any regulatory jurisdiction over

Fed. Reg. 8372 (1987). Finally, at least one state that assumed "as if" jurisdiction over a newly recognized tribe, see *supra* note 99, retroceded its acquired jurisdiction. See 25 U.S.C. § 1300f(c) (1982) (congressional grant of jurisdiction to Arizona over the Pascua Yaqui); 50 Fed. Reg. 34555-01 (1985) (Arizona's subsequent retrocession of jurisdiction). In addition to these state retrocessions, in 1970 Congress restored to the Metlakatla Reserve in Alaska the right to "exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes" in non-Public Law 280 states. Act of Nov. 25, 1970, Pub. L. No. 91-520, 84 Stat. 1358.

104. In addition to the mandatory states, see *supra* note 100, these states include: Florida, Idaho, Iowa, Montana, and Washington. Nevada, which early-on assumed Public Law 280 jurisdiction over the reservations in that state, no longer exercises any Public Law 280 jurisdiction following its recent retrocession of jurisdiction over the Ely Colony (Shoshone). 53 Fed. Reg. 5837 (1988).

The most recent *Handbook of Federal Indian Law* reports that ten non-mandatory states have "acted to accept" jurisdiction, adding to the above states Arizona, North and South Dakota, and Utah. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 362-63 & n.125 (1982). Notwithstanding the technical accuracy of the *Handbook*, there is a difference between a "paper" assumption of Public Law 280 jurisdiction and actual enforcement. For example, while Arizona insists upon asserting Public Law 280 jurisdiction over native lands under that state's air pollution statutes, the federal Environmental Protection Agency officially has stated that this assertion is illegal. See *infra* note 229. Both North Dakota and Utah require the consent of the tribe to assume Public Law 280 jurisdiction, but to date, no tribe in either state has so consented. See *Malaterre v. Malaterre*, 293 N.W.2d 139, 143 (N.D. 1980); *United States v. Felter*, 752 F.2d 1505, 1508 n.7 (10th Cir. 1985) (Utah). But see *supra* note 99 (Utah Public Law 280 "as if" jurisdiction mandated for newly restored Paiute Bands). South Dakota's attempted assumption of Public Law 280 civil jurisdiction has been held invalid. *State v. Hero*, 282 N.W.2d 70, 72 (S.D. 1979).

105. See, e.g., *Confederated Tribes of the Colville Indian Reservation v. Beck*, 6 Indian L. Rep. F-8 (E.D. Wash. 1978) (concurrent tribal-state criminal jurisdiction); *State v. Michael*, 111 Idaho 930, 729 P.2d 405, 408 n.1 (1986) (tribal court may have concurrent jurisdiction with adjoining state on Public Law 280 reservation).

106. Public Law 280 is a prime example of federal plenary power at work. See *supra* Section I.A.1. By enacting Public Law 280, Congress not only endowed the states with jurisdiction over native tribes and peoples, but in the process stripped native governments of formerly exclusive sovereign powers. See, e.g., *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 478 n.22 (1979) (spurning as "tendentious" the tribe's assertions that its treaty-reserved right to self-government could not be abrogated by implication and was not abrogated expressly by enactment of Public Law 280).

native reservations.¹⁰⁷ Accordingly, where a state asserts the right to enforce its laws on a reservation that is subject to Public Law 280, courts often must engage in an initial analysis to determine whether the state laws at issue merely regulate conduct or instead prohibit it.¹⁰⁸ If the laws are found to be prohibitory, then the state may enforce them in Indian country under its Public Law 280 criminal jurisdiction.¹⁰⁹ If the laws are found to be regulatory, however, the courts apply the infringement/preemption test outlined above to determine whether the laws may be applied within reservation borders.¹¹⁰ If a

107. *Bryan v. Itasca County*, 426 U.S. 373, 378–79, 385 (1976) (Public Law 280 was not a grant of the power to tax, but was intended to grant jurisdiction over private civil court causes of action). This holding in *Bryan* recently was reaffirmed in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (the civil provision of Public Law 280 has been interpreted “to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority”).

Despite the fact that the holding in *Bryan* is clear, long-standing, and recently reaffirmed, states persist in attempting to justify intrusions of regulatory authority by reference to their Public Law 280 jurisdiction. *See, e.g., Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 532 (9th Cir. 1987), *cert. granted sub nom. Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 108 S. Ct. 2843 (1988), in which the county maintained that Public Law 280 divested the Yakima of any regulatory jurisdiction over non-natives on fee land. The court responded tersely. “This argument lacks merit Because zoning is clearly regulatory, Public Law 280 does not affect Yakima Nation’s authority to zone.” *Id.* Nonetheless, persevering to the end, one of the landowners in the petition for certiorari presented the question whether fee ownership by a non-native, coupled with Washington’s assumption of Public Law 280 jurisdiction over all non-trust land in Indian country, divested the Yakima Nation of exclusive zoning rights over non-native fee land. *Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 56 U.S.L.W. 3775 (1988).

108. This test was developed in and extensively used by the lower federal courts, primarily in cases concerning gambling. *See, e.g., Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) (bingo); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (bingo). The prohibitory-regulatory distinction recently was approved by the Supreme Court, which in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987), adopted the lower courts’ analysis.

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280’s grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State’s public policy.

Id. at 209. This preliminary prohibitory versus regulatory analysis is only necessary, of course, if the state asserts that the particular laws are criminal in nature.

109. On a reservation fully subject to Public Law 280, the state has jurisdiction over all crimes committed within reservation borders other than those federal crimes that are exclusive of state jurisdiction. 18 U.S.C. § 1162 (1982).

110. This development appears to have its genesis in the *Cabazon* decision, at least with respect to state laws directly applicable to native people and their tribes. Prior lower court cases using the prohibitory versus regulatory analysis did not engage in the infringement/preemption test once a state law was determined to be regulatory. These cases noted, rather, that states have no regulatory jurisdiction in Indian country absent a grant of authority from the federal

law is regulatory, then the test for its application does not vary between Public Law 280 and non-Public Law 280 reservations.

4. *The Applicability of Local Laws*

Federal courts commonly have held that local laws are not applicable within the boundaries of native reservations.¹¹¹ The premier case on local authority is *Santa Rosa Band of Indians v. Kings County*,¹¹² in which the Ninth Circuit declared that assertions of local jurisdiction infringe on tribal sovereignty and self-government.¹¹³ A grant of civil

government. Because Public Law 280 did not grant such regulatory authority, the states were without jurisdiction to impose their noncriminal laws on native nations. See, e.g., *Barona Group*, 694 F.2d at 1188–90; *Seminole Tribe*, 658 F.2d at 312–15; *Oneida Tribe of Indians of Wisconsin v. State*, 518 F. Supp. 712, 716, 719–20 (1981).

111. *Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153 (8th Cir. 1985); *United States v. Humboldt County*, 615 F.2d 1260 (9th Cir. 1980); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

At first blush, tribes have not fared as well in state decisions, particularly in Wisconsin. See *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985) (affirming conviction of a Lac du Flambeau member for violation of a county traffic ordinance); Op. Att’y Gen. Wis. 19-87 (April 17, 1987) (positing that an on-reservation tribal business was subject to local liquor licensing). But see *Zachary v. Wilk*, 173 Cal. App. 3d 754, 219 Cal. Rptr. 122 (1985), holding that a municipal rent control ordinance could not be applied to a mobile home park located on native land. “[W]hen a local regulation is applied to Indian lands, it is the *form* (i.e., local nature) of the regulation rather than its *content* which interferes with the Indians’ sovereignty.” 219 Cal. Rptr. at 127 (emphasis in original). Cf. *Thomsen v. King County*, 39 Wash. App. 505, 694 P.2d 40 (applicability of county health regulations to non-natives on fee land does not interfere with tribal sovereignty where tribe has chosen to apply county standards and specifically has sought joint tribal-county enforcement), *review denied*, 103 Wash. 2d 1030 (1985).

112. 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

113. *Id.* at 663 (holding that “extension of local jurisdiction is inconsistent with tribal self-determination and autonomy”).

[S]ubjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile local non-Indian majorities. Local communities may not share the usually poorer Indian’s priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.

Id. at 664. Five years after *Santa Rosa*, the Ninth Circuit expressly declined to overrule that case when requested to do so. *United States v. Humboldt County*, 615 F.2d 1260, 1261–62 (9th Cir. 1980).

Recently, however, the Ninth Circuit appears to have retreated from the clarity of *Santa Rosa*. In cases involving county zoning and rent control ordinances, the court of appeals did not declare that the local laws were barred by the mere fact of their municipal nature. Rather, the Ninth Circuit engaged in the standard infringement/preemption test for state jurisdiction. *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529 (9th Cir. 1987), *cert. granted sub nom. Brendale v. Confederated Bands and Tribes of the Yakima Indian*

or criminal jurisdiction to a state pursuant to Public Law 280, the court held, does not confer jurisdiction on the state's subordinate units of government.¹¹⁴ The United States Supreme Court, although it has not ruled directly on the issue, has voiced its doubt that Public Law 280 ever would authorize local jurisdiction over native reservations.¹¹⁵ In any case, where state jurisdiction is barred, local authority likewise is prohibited.¹¹⁶

D. Summary of Regulatory Authority in Indian Country

The preceding section outlined the legal theories that undergird the assertion of regulatory control in Indian country by the federal, tribal, and state governments. Under domestic law, the federal government can exercise whatever regulatory authority it pleases on the reservation, either under its arrogated plenary power to regulate natives directly, or pursuant to the judicially created rule permitting general federal legislation to be applied to tribes.

Native nations retain inherent sovereign powers of regulatory control over the territory and inhabitants of the reservation, except for specific instances where native governmental powers have been ceded by treaty or lost through congressional legislation or judicial divestment. In addition, tribes may exercise powers delegated to them by federal action. Tribal regulatory powers extend to non-natives in Indian country, even on non-native fee lands, in all instances where the non-natives enter into consensual dealings with tribal governments or members, and where non-native activity may impact tribal health, welfare, economic stability, or political integrity.

State regulatory powers in Indian country are quite limited. As a general rule, states may regulate within native territory only when state control is not preempted by federal law, as determined largely through a balancing of tribal, federal, and state interests, or when state

Nation, 108 S. Ct. 2843 (1988); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987). Using that test, the court held that a county could not apply its rent control ordinance to non-native lessees of native allotments, *Segundo*, 813 F.2d at 1392-93, or its zoning ordinance to non-native fee land within a "closed" area of the Yakima Reservation, *Whiteside*, 828 F.2d at 535, but remanded for a balancing of county and tribal interests in zoning fee lands in an "open" area, *id.* at 536. Despite generally favorable outcomes, the court's use of the infringement/preemption analysis represents a significant regression from its original understanding, expressed in *Santa Rosa*, that local authority in and of itself constitutes an infringement of tribal sovereignty.

114. *Santa Rosa*, 532 F.2d at 661; see also Goldberg, *supra* note 99, at 580-83.

115. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212 n.11 (1987) ("language [of Public Law 280] seems clearly to exclude local laws").

116. *Id.* ("even if Pub. L. 280 does make local criminal/prohibitory laws applicable on Indian reservations, the ordinances in question here do not apply . . . [because they are] regulatory in nature").

control does not infringe upon tribal sovereignty. Where state regulations would be applied directly to native tribes, persons, or activities, states may exert regulatory authority only where the state interests in regulating constitute exceptional circumstances.

Against this background of general regulatory jurisdiction within Indian country, the following sections will describe the framework of state pollution control laws and explore the extent to which these state environmental schemes apply within the territories of the native nations. The next section will outline the various types of state pollution control schemes that tribes are likely to encounter.

II. STATE POLLUTION CONTROL LAWS

States generally assert the right to legislate over persons and activities within Indian country. With judicial removal of the absolute bar to state regulatory jurisdiction, assertions of state power within contiguous native territories have increased in both frequency and intensity. Court battles over state attempts to control liquor, gambling, land use, taxation, and the like have become common. To a great extent, this contest for regulatory primacy arises as a result of the ethnocentric view of the states that native lands are not extraterritorial to the states they abut. States generally are willing to perceive native nations, at best, as more or less the equivalent of municipalities: geo-political subdivisions of the state entitled to some tribal form of home rule for internal affairs, but otherwise subject to the authority of the state.

In the late 1960's, the United States awakened to a new ecological consciousness. Congress and the state legislatures reacted to the growth of public awareness of environmental issues with a spate of legislation aimed at controlling the spread of pollution and rectifying existing environmental damage. By the 1980's, as governmental familiarity with pollution control schemes grew, both federal and state agencies began to turn their attention to those narrower and more select ecological issues that had escaped notice in the earlier years of designing and implementing the general environmental programs. Pollution in Indian country was one of those issues. Almost inevitably, given the history of attempted state regulatory incursions into native interests, many states proposed extending state pollution control authority over tribal territories.

This section will explore the framework of state pollution control laws, discussing the various types of laws and regulations implemented by the states within their borders. There are three primary sources of state statutes and regulations governing pollution control: state pro-

grams enacted "in lieu of" the federal programs established by the federal statutes,¹¹⁷ more stringent state standards and requirements expressly permitted under the federal acts,¹¹⁸ and additional state laws enacted pursuant to state police powers, addressing areas of pollution control not covered by the federal schemes.¹¹⁹ Whether any of these state enactments is applicable in Indian country is determined by the three-tiered analysis developed in Section IV of this Article. The specific analysis applicable will vary with the source of the state law.

A. State "In Lieu Of" Programs

The federal pollution control acts generally establish federal standards and programs for controlling pollution either by regulating the pollutant at the emission source or by regulating the quality of the protected resource.¹²⁰ Various provisions contained in these acts permit, or sometimes require, the development of state programs within the guidelines set out in the federal acts. State programs that meet federal requirements then may be implemented "in lieu of" the federal programs in the particular state.¹²¹ The general purpose of these state "in lieu of" schemes is to combine national uniformity in pollution control standards with local program implementation.¹²² To ensure implementation of national standards, the federal government typi-

117. See, e.g., Resource Conservation and Recovery Act, 42 U.S.C. §§ 6926-6991 (1982) (authorizing state hazardous waste programs "in lieu of" the federal program). The "in lieu of" language is found only in this Act. Nonetheless, because the term is a convenient way to refer to federally delegated state programs, it will be used in this Article to designate all state programs implemented under any of the federal pollution control acts.

118. See *infra* note 157 and accompanying text.

119. The federal pollution control acts, while generally comprehensive, cannot and do not cover every possible aspect of pollution control. The states retain their ability to regulate environmental matters under the police power. See *infra* notes 158-60 and accompanying text.

120. For example, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986), attempts to control pollution at the source by establishing standards for release of pollutants at "point sources." By contrast, the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1986), establishes air quality standards, and then works backward to control air pollutants. See A. SANDERS & R. OTSEA, PROTECTING INDIAN NATURAL RESOURCES: A MANUAL FOR LAWYERS REPRESENTING INDIAN TRIBES OR TRIBAL MEMBERS 80 (1982) (published by Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302).

121. Even where state "in lieu of" programs are implemented, however, the federal presence does not disappear altogether. The federal government generally remains responsible for ensuring that state programs function effectively and in compliance with federal law. See *infra* notes 145-47 and accompanying text.

122. The state point of view often is that the purpose of the scheme is to remove from the states most choices concerning the substance of the program, while at the same time externalizing to the states the costs and other burdens of implementation. See, e.g., U.S. GENERAL ACCOUNTING OFFICE, *Federal-State Environmental Programs—The State Perspective* (1980); Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENV'T L. 679, 703-05, 734 (1982).

cally retains primary authority where no approved state plan is in effect.

The discussion in this Article focuses on the federally delegated state programs established under seven of the major federal pollution control acts: (1) the Clean Air Act ("CAA"),¹²³ under which the federal Environmental Protection Agency ("EPA") is required to establish national air quality standards for a broad range of air pollutants;¹²⁴ (2) the Clean Water Act ("CWA"),¹²⁵ which calls for developing "comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters";¹²⁶ (3) the Comprehensive Environmental Response, Compen-

123. 42 U.S.C. §§ 7401-7642 (1982).

124. *Id.* § 7409. The EPA is required to promulgate national ambient air quality standards for "each air pollutant for which air quality criteria have been issued." *Id.* § 7409(a)(1)(A).

The CAA establishes programs to address each of two types of air quality areas. In nonattainment areas, those for which the air quality is in violation of the national standards for any of the regulated pollutants, *id.* § 7501(2), the Act calls for the "expeditious attainment" of the national air quality standards through measures such as emission limitations and permits for the construction and operation of new sources of air pollutants. *Id.* § 7502. For "clean" or attainment areas, CAA establishes a program for the prevention of significant deterioration (PSD) of air quality. Attainment areas are divided into three classes: Class I protecting pristine air quality, Class II permitting some air quality deterioration, and Class III tolerating even greater deterioration, although in no case may air quality fall below the national standards. *Id.* § 7473. All "clean" areas initially are classified as Class II, *id.* at § 7472(b), except for a few statutory designations at Class I: all international parks, and national wilderness areas, national memorial parks, and national parks above a designated acreage. *Id.* at § 7472(a).

For a detailed discussion of CAA and its two major programs, see Lutz, *Managing a Boundless Resource: U.S. Approaches to Transboundary Air Quality Control*, 11 ENV'T'L L. 321, 323-55 (1981).

125. 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986). The CWA also is known as the Federal Water Pollution Control Act ("FWPCA").

126. *Id.* § 1252(a). Under this sweeping charge, the Act establishes three main programs. One is the National Pollutant Discharge Elimination System ("NPDES") program, under which a permit must be obtained before any "point source" may discharge pollutants into navigable waters. *Id.* § 1342(a). A "point source" is defined as "any discernible, confined and discrete conveyance," such as a pipe, ditch, conduit, well, container, or vessel "from which pollutants are or may be discharged." *Id.* § 1362(14). The second program is the permit program for the discharge into navigable waters of dredged or fill material, *id.* § 1344(g), known as the "§ 404" permit program after the section of FWPCA that created it. Pub. L. No. 92-500, § 404, 86 Stat. 816 (1972). The 1987 amendments to CWA created a third program for "controlling pollution added from nonpoint sources to the navigable waters." 33 U.S.C.A. § 1329(b)(1) (West Supp. 1989). Although a "nonpoint source" of water pollution is not defined expressly in the Act, the term apparently includes any source other than one defined as a "point source." The amendments also address the protection of groundwater quality through a program of grants. *Id.* § 1329(i).

sation, and Liability Act ("CERCLA"),¹²⁷ or the "Superfund Act," aimed primarily at cleaning up hazardous waste sites and spills;¹²⁸ (4) the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"),¹²⁹ which controls and regulates the use of pesticides;¹³⁰ (5) the Resource Conservation and Recovery Act ("RCRA"),¹³¹ enacted to reduce or eliminate the generation of hazardous waste, and to treat and store existing hazardous waste in a manner that will minimize the threat to human health and the environment;¹³² (6) the Safe Drinking Water Act ("SDWA"),¹³³ which protects drinking water supplies;¹³⁴ and (7) the Surface Mining Control and Reclamation Act

127. 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1706 (codified at 42 U.S.C. § 9626) (1982 & Supp. IV 1986).

128. To that end, CERCLA provides for notification procedures and federal remedial action in case of the release of a hazardous substance, 42 U.S.C. §§ 9603, 9604; a "Superfund" to pay the costs of responding to a release, *id.* § 9611; and standards for clean up of hazardous materials releases, *id.* § 9621. The Act also establishes a national priorities list of sites most in need of remedial action. *Id.* § 9605.

The national hazardous waste management policy is contained in the combination of CERCLA and the Resource Conservation and Recovery Act ("RCRA"), *discussed infra* at notes 131-32 and accompanying text. According to one commenter, there are four major goals to the national policy: (1) cleaning up hazardous waste sites and compensating victims; (2) bringing existing facilities up to state of the art, or at least safer, practices; (3) encouraging new facilities to use the most environmentally sound management practices; and (4) encouraging recycling wherever possible. The first goal is addressed partially by CERCLA, and the last three are addressed by RCRA. Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 2 UCLA J. ENV'T'L L. & POL'Y 1, 4-5 (1981).

129. 7 U.S.C. §§ 136-136y (1982 & Supp. IV 1986).

130. The Act establishes procedures for registration of pesticides and pesticide producers, *id.* §§ 136a, 136e, certification of pesticide applicators, *id.* § 136b, and regulation of the import, export, transportation, and disposal of pesticides, *id.* §§ 136o, 136q. In general, FIFRA forbids the distribution, sale, shipment, delivery, or receipt of any pesticide that is not registered with the federal government. *Id.* § 136a(a). However, "to meet special local needs," states may register federally registered pesticides for additional uses, so long as the federal government previously has not denied that use of the pesticide. *Id.* § 136v(c).

131. 42 U.S.C. §§ 6901-6991 (1982 & Supp. IV 1986).

132. *Id.* § 6902(b). The Act's ambitious purpose is to regulate and manage hazardous waste from generation through final disposal, popularly referred to as "cradle to grave" management, through measures such as identification of hazardous wastes and waste sites, standards for generators, transporters, and owners and operators of treatment, storage, and disposal facilities, and permits for the treatment, storage, and disposal of hazardous waste. *Id.* §§ 6921-6939. The RCRA also provides for development of federal guidelines for state solid waste management plans. *Id.* § 6942.

133. 42 U.S.C.A. §§ 300f-300j-11 (1982 & Supp. IV 1986).

134. The Act establishes three major programs. The first is the public water systems program, which sets drinking water quality standards. *Id.* §§ 300g-300g-1. The second program is the underground injection control ("UIC") program, which regulates the injection of fluids into the ground. *Id.* § 300h. The 1986 amendments to the Act established a third program for the protection of wellhead areas, *id.* § 300h-7, defined as the surface and subsurface area surrounding a water well or wellfield that supplies a public water system. *Id.* § 300h-7(e).

("SMCRA")¹³⁵ enacted upon congressional findings that surface coal mining was contributing not only to the nation's energy needs, but also to the nation's environmental problems.¹³⁶

1. State Programs Under the Federal Acts

Each of these federal pollution control acts provides for state implementation and enforcement of the programs established in the statutes. In most cases, state assumption of regulatory authority is discretionary with the state. For the programs contained in FIFRA,¹³⁷ RCRA,¹³⁸ and SMCRA,¹³⁹ and for selected programs of CWA¹⁴⁰ and SDWA,¹⁴¹ a state may submit a plan to EPA for federal approval. Once EPA approves the state's program, the state then assumes primacy for the particular program "in lieu of" the federal government. The Superfund Act also is discretionary, but with the federal government rather than the states. The Act authorizes the

135. 30 U.S.C. §§ 1201-1328 (1982 & Supp. IV 1986). Unlike the other federal pollution control acts discussed in this article, SMCRA is administered by the Department of the Interior rather than EPA.

136. *Id.* § 1201. The Act established two major surface mining programs: The abandoned mine reclamation program, *id.* §§ 1231-1243, and a program to control the environmental effects of surface coal mining through the issuance of permits for coal exploration and for the development of new, previously mined, or abandoned mines, including environmental protection performance standards and reclamation plans. *Id.* §§ 1251-1279.

137. States may assume primacy for the certification of pesticide applicators, 7 U.S.C. § 136b (1982), and also are authorized to regulate the sale and use of federally registered pesticides, and to register pesticides for additional uses, "to meet special local needs," so long as the state does not permit uses prohibited by federal law. *Id.* § 136v(c). In addition, states are accorded primary enforcement responsibility for pesticide use violations if they have either an approved applicator certification plan that adequately addresses pesticide use, or a cooperative agreement with the federal government, or if EPA determines that the state has adequate pesticide use laws, regulations, and enforcement procedures. *Id.* § 136w-1(a), (b).

138. States may take primary responsibility to administer and enforce hazardous waste programs. 42 U.S.C. § 6926(b) (1982 & Supp. IV 1986). *See generally* Schnapf, *supra* note 122, at 694-97. Unique among the federal environmental acts discussed in this Article, RCRA provides for interim authorization of state hazardous waste programs prior to final authorization. 42 U.S.C. § 6926(c) (1982 & Supp. IV 1986). States also may develop and implement plans for solid waste management. *Id.* §§ 6942-6943, 6946-6947.

139. States may take jurisdiction over the regulation of surface coal mining and reclamation operations. 30 U.S.C. § 1253(a) (1982). Any state with an approved regulatory program also may submit a plan to take jurisdiction over the abandoned mine reclamation program. *Id.* § 1235.

140. States may administer the NPDES and § 404 permit programs under CWA. 33 U.S.C. §§ 1342(b), 1344(g) (1982 & Supp. IV 1986). Any state proposing to operate either permit program must submit to EPA a statement certifying that its laws provide it with adequate authority to carry out the proposed state program. *Id.*

141. The SDWA provides that states may assume primary responsibility for enforcement of the public water systems program. 42 U.S.C. § 300g-2(a) (1982 & Supp. IV 1986).

President, "in his [sic] discretion," to delegate response authority to the states.¹⁴²

In three instances the statutes mandate state primacy. States are required under these acts or programs to develop and submit state plans for federal approval.¹⁴³ Under two of these mandatory state plan provisions, EPA is obligated to prescribe a state plan if the state fails to submit an adequate plan or if the submitted plan is disapproved.¹⁴⁴

Typically, the federal government retains a residual enforcement authority in states exercising discretionary or mandatory "in lieu of" jurisdiction. Under most of the federal pollution control acts, the federal government reserves jurisdiction, upon notice to the state, to issue compliance orders or commence civil actions against violators of the state plan or program.¹⁴⁵ In addition, the federal government generally may withdraw its approval of a state plan where the state fails to

142. The CERCLA provides that states may apply for authority to carry out remedial and response actions in connection with the release or substantial threat of release of any hazardous substance into the environment. 42 U.S.C. § 9604(a)(1), (d)(1) (1982 & Supp. IV 1986). If the President determines that the state has the capability to carry out the federal mandate, the federal government, at the President's discretion, may enter into a contract or cooperative agreement with the state. *Id.* § 9604(d)(1). The federal government, however, will not provide any remedial action unless the affected state first enters into a contract or cooperative agreement in which the state guarantees future maintenance of the remedial action, availability of a federally approved hazardous waste disposal facility, and payment of a percentage of the cleanup costs for any state operated facility. *Id.* § 9604(c)(3).

143. Under CAA and selected programs of CWA and SDWA, states are required to develop and submit state plans for federal approval.

Under CAA, each state is required to submit a State Implementation Plan ("SIP") for the "implementation, maintenance, and enforcement" of the federal air quality standards. 42 U.S.C. § 7410 (1982). In addition to the SIP's, states have the primary role under CAA for redesignating air quality in attainment areas, including national lands, within their borders. *Id.* § 7474. Under the 1987 amendments to CWA, states are required to prepare and submit to EPA management programs for controlling water pollution from nonpoint sources. 33 U.S.C.A. § 1329(b)(1) (West Supp. 1989). *See generally* Davidson, *Thinking about Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D.L. REV. 20 (1989). Similarly, states are required under the 1986 amendments to SDWA to submit for approval management programs for the protection of wellhead areas. 42 U.S.C. § 300h-7(a) (1982 & Supp. IV 1986). In addition, the states also are required to submit a UIC program in each state where EPA determines that an underground injection control program may be necessary to prevent endangering drinking water sources. *Id.* § 300h-1(a), (b).

144. 42 U.S.C. § 7410(c) (1982) (CAA); 42 U.S.C. § 300h-1(a) (1982 & Supp. IV 1986) (Safe Drinking Water Act UIC program). In other instances where the state plans are mandatory, EPA may compel a state that has submitted an inadequate plan to revise and resubmit the state program within a statutorily specified period of time. 33 U.S.C.A. § 1329(d)(2) (West Supp. 1989) (CWA nonpoint source pollution program); 42 U.S.C. § 300h-7(c)(2) (1982 & Supp. IV 1986) (SDWA wellhead protection program).

145. *See* 42 U.S.C. § 7413(a) (1982) (CAA); 33 U.S.C. § 1319(a) (1982) (Clean Water Act NPDES and § 404 programs); 42 U.S.C. § 6928(a) (1982) (RCRA hazardous waste program); 42 U.S.C. § 300g-3 (1982 & Supp. IV 1986) (SDWA public water system program); *id.* § 300h-2

administer or enforce the state program according to the requirements of the federal statutes.¹⁴⁶ In some instances the federal government itself may enforce the state plan where the state fails to do so.¹⁴⁷

2. *Native Nations as States Under the Federal Acts*

About half of the federal pollution control acts now contain provisions mandating that tribes be treated as states for most purposes of the statutory schemes. The SMCRA has contained such a provision since 1977,¹⁴⁸ and recent amendments added a "tribes-as-states" provision to CWA,¹⁴⁹ the Superfund Act,¹⁵⁰ and SDWA.¹⁵¹ Generally,

(UIC program); *see also* 30 U.S.C. § 1271(a) (1982) (permitting the Secretary of the Interior, upon notice to the state, to take actions to correct violations of SMCRA).

146. 7 U.S.C. § 136b(b) (1982 & Supp. IV 1986) (FIFRA certification of pesticide applicators); *id.* § 136v(c)(4) (registration of pesticides for additional uses); 33 U.S.C. § 1342(c) (1982) (Clean Water Act NPDES program); *id.* § 1344(i) (§ 404 program); 42 U.S.C. § 6926(e) (1982) (RCRA hazardous waste plans); 30 U.S.C. § 1235(d) (1982) (SMCRA abandoned mine reclamation program).

147. If the federal agency finds that violations are so widespread as to constitute a failure on the part of the state to enforce its implementation plan, the federal government may assume enforcement responsibility. *See, e.g.,* 42 U.S.C. § 7413(a) (1982) (CAA); 30 U.S.C. §§ 1254(b), 1271(b) (1982) (SMCRA).

148. Pub. L. No. 95-87, § 405, 91 Stat. 459 (1977) (codified at 30 U.S.C. § 1235(k) (1982)). The Act provides that tribes shall be considered as states under the abandoned mine reclamation program. 30 U.S.C. § 1235(k) (1982). An anomaly appears to exist in the structure of the Act. States may not receive federal approval of their abandoned mine reclamation programs unless they have approved state regulatory programs. *Id.* § 1235(c). If this requirement applies equally to tribes as to states, then tribes are in an impossible position. Tribes are not treated expressly as states under the Act's provisions for regulating surface coal mining; hence, tribes cannot have approved "state" regulatory programs. Thus, despite the express authorization of § 1235(k), native nations ostensibly cannot obtain federal approval for abandoned mine reclamation programs.

In addition, SMCRA provided for a study on "the question of the regulation of surface mining on Indian lands." *Id.* § 1300(a). The report was submitted in 1979. COUNCIL OF ENERGY RESOURCE TRIBES, THE CONTROL AND RECLAMATION OF SURFACE MINING ON INDIAN LANDS (1979). The study advanced proposals for remedial legislation, but the Act has yet to be amended with regard to the regulation of surface coal mining in Indian country.

149. Clean Water Act Amendments of 1987, Pub. L. No. 100-4, § 506, 101 Stat. 77 (codified at 33 U.S.C.A. § 1377 (West Supp. 1989)). The new section provides that EPA shall treat tribes as states for most purposes and programs of the Act, including the NPDES and § 404 permit programs and the nonpoint source management program, "to the degree necessary to carry out the objectives of this section." *Id.* § 1377(e).

Until EPA promulgates regulations specifying how tribes are to be treated as states under CWA, other measures are available to tribes. Recently, at the request of the Colville Confederated Tribes, EPA proposed to adopt the Tribe's water quality standards as federal standards for the Colville Reservation. 53 Fed. Reg. 26,968 (1988).

A native government that assumes responsibility for programs under CWA may exercise its authority over water resources held by the tribe, by the United States in trust for the tribe or a member, or "otherwise within the borders of an Indian reservation." 33 U.S.C.A. § 1377(e)(2) (West Supp. 1989). The CWA also contains provision for federal settlement of disputes between states and tribes sharing common bodies of water. *Id.* § 1377(e). The EPA is required to

the statutory tribes-as-states treatment is limited by the language of the acts: CWA, SDWA, and CERCLA place restrictions upon the

"provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water." *Id.*

150. Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, § 207(e), 100 Stat. 1706 (codified at 42 U.S.C. § 9626 (Supp. IV 1986)). The new section provides that a native government "shall be afforded substantially the same treatment as a State" with respect to a number of the provisions of CERCLA, including notification of releases, consultation on remedial actions, access to information, roles and responsibilities under the national contingency plan, and submittal of priorities for remedial action. *Id.* § 9626(a). Tribes specifically are authorized to enter into contracts or cooperative agreements with the federal government to carry out removal or other remedial actions in case of releases of hazardous substances, *id.* § 9604(d)(1)(A), and to assert claims against the Superfund for damages to tribal natural resources and for the costs of restoring or replacing damaged resources. *Id.* § 9611(b)(1), (c).

Some express exceptions to the general tribes-as-states provision exist. Each state is entitled to have one facility on the national list of priorities for remedial action. *Id.* § 9605(a)(8)(B). The treatment of tribes as states, however, specifically excludes this entitlement. *Id.* § 9626(a). Native nations also are exempt from certain assurances of future maintenance and cost-sharing required of states in the case of federal remedial actions, *id.* § 9604(c)(3), and from certain time limitations placed on state governments. *Id.* § 9626(d).

The CERCLA amendments also call for a study of hazardous waste sites on native lands, including recommendations on tribal needs with an emphasis on maximum tribal participation in the administration of CERCLA programs. *Id.* § 9626(c). The report was to be submitted to Congress with the President's budget request for fiscal year 1988. The Council of Energy Resource Tribes completed a survey of hazardous waste sites on 25 selected native reservations in 1985, finding that nearly 1200 waste generators or sites existed within the participating reservations, and that five reservations contained a total of six hazardous waste activities or sites "requiring prompt investigation." COUNCIL OF ENERGY RESOURCE TRIBES, INVENTORY OF HAZARDOUS WASTE GENERATORS AND SITES ON SELECTED INDIAN RESERVATIONS 21 (1985).

151. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, § 302(a), 100 Stat. 665 (codified at 42 U.S.C.A. § 300j-11(a) (West Supp. 1988)). The amendments authorize EPA "to treat Indian Tribes as States" under the Act, and specifically provide that native nations may assume primary enforcement responsibility for both public water systems and UIC programs. *Id.* Tribal primacy under the UIC program also is addressed at § 300h-1(e), which exempts tribes from certain time limits placed upon states, and provides that EPA will prescribe a UIC program where one does not exist for a native nation.

Where treatment of a tribe as a state is considered "inappropriate, administratively infeasible or otherwise inconsistent with the purposes" of the Act, however, EPA is entitled to promulgate "other means for administering such provision in a manner that will achieve the purpose of the provision." *Id.* § 300j-11(b)(2).

native nations that may receive treatment as states,¹⁵² and SMCRA is limited to tribes with certain types of lands.¹⁵³

Two additional federal environmental statutes, although they do not include special tribes-as-states provisions, specifically delegate to tribes primary authority for certain programs. The CAA places with native nations the exclusive authority to redesignate air quality for reservations;¹⁵⁴ and FIFRA expressly permits EPA to enter into cooperative agreements with tribes to enforce pesticide use violations and to train

152. For example, SDWA provides that treatment as a state is authorized only if:

(A) the Indian Tribe is recognized by the Secretary of the Interior and has a governing body carrying out substantial governmental duties and powers;

(B) the functions to be exercised by the Indian Tribe are within the area of the Tribal Government's jurisdiction; and

(C) the Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of this subchapter and of all applicable regulations.

42 U.S.C.A. § 300j-11(b)(1) (West Supp. 1988); *see also* 53 Fed. Reg. 37,396, 37,398-402 (1988) (final SDWA rules interpreting these requirements). The provisions of CWA are similar. *See* 33 U.S.C.A. § 1377(e) (West Supp. 1988).

The broadest statutory definition of tribes to be treated as states is found in SARA, the 1986 amendments to CERCLA:

The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

42 U.S.C.A. § 9601(36) (West Supp. 1988). Federal authorization to enter into a contract or cooperative agreement with a native tribe, however, is available only "[i]f the President determines that the . . . Indian tribe has the capability to carry out any or all of such actions in accordance with the criteria and priorities established [in the act] and to carry out related enforcement actions." *Id.* § 9604(d)(1)(A). The requirements for approval of a state application are identical. *Id.*

153. Treatment as states is available to tribes with "eligible lands" and lands "from which coal is produced . . ." 30 U.S.C. § 1235(k) (1982). Eligible lands are those "which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or other Federal laws." *Id.* § 1234.

154. The CAA provides that "[l]ands within the exterior boundaries of reservations of federally-recognized Indian tribes may be redesignated only by the appropriate Indian governing body." 42 U.S.C. § 7474(c) (1982). The Spokane Tribe recently requested, and EPA proposed for approval, a redesignation of the Spokane Reservation's air quality to Class I. 54 Fed. Reg. 1954 (1989).

In addition, the Act provides for federal resolution of disputes between native governments and states where either government objects to redesignation by the other or to a permit for a new emission source that would cause or contribute to air pollution in excess of that allowed by the tribal or state government. 42 U.S.C. § 7474(e) (1982). Either government may request EPA to enter into negotiations with the governments involved, and to make recommendations to resolve the dispute. If the parties do not reach agreement, however, EPA "shall resolve the dispute," and the federal determination then becomes part of the governments' air quality plans. *Id.*

and certify pesticides applicators.¹⁵⁵ Only one of the seven federal acts, RCRA, does not contain either a general tribes-as-states section or express authorization for tribes to assume specific program responsibilities.¹⁵⁶

B. Additional State Pollution Control Laws

State pollution control efforts are not confined to the "in lieu of" programs developed under the auspices of the federal acts, but include as well state pollution control laws additional or supplementary to the delegated programs. These state laws take two forms. First, several of the federal environmental statutes—CWA, RCRA, and SMCRA—expressly permit states to enact more stringent standards, limitations, and requirements than those promulgated as federal minimums.¹⁵⁷ Despite the generally comprehensive nature of the regulatory schemes established by these federal pollution control acts, more stringent state laws, by congressional fiat, are deemed not inconsistent with the federal acts.

In addition to stricter state regulations specifically permitted by federal law, states are entitled under their police power to regulate in areas not covered by the federal pollution control acts.¹⁵⁸ Although

155. 7 U.S.C. § 136u(a) (1982). By contrast, states may assume primary enforcement responsibility for pesticide use violations not only by entering into a cooperative agreement with EPA, but also if the state has a federally approved plan or if EPA determines that the state has adequate laws, regulations, and enforcement procedures. *Id.* § 136w-1(a), (b).

156. Native governments are mentioned only once in RCRA—in the definition section. A "person" for purposes of the Act includes a municipality, 42 U.S.C. § 6903(15) (1982), and the definition of municipality in turn includes "an Indian tribe or authorized tribal organization or Alaska Native village or organization." *Id.* § 6903(13). As "persons," native tribes are subject to compliance actions under RCRA's citizen suit provision. *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989).

One other federal environmental act, SDWA, also defines "municipality" as including native tribes, and "person" as including municipalities. 42 U.S.C. § 300f(10), (12) (1982). The EPA has stated that tribes which do not meet the tribes-as-states criteria of SDWA, *see supra* note 152, will be treated as municipalities. 53 Fed. Reg. 37,396, 37,397 (1988).

157. 33 U.S.C. § 1370 (1982) (CWA); 42 U.S.C. § 6929 (1982) (RCRA); 30 U.S.C. § 1255 (1982) (SMCRA). The RCRA specifically preserves a state's right to impose more stringent site selection requirements, 42 U.S.C. § 6929 (1982), and to carry out all state and local solid waste planning and management activities that are not inconsistent with approved state solid waste management plans. *Id.* § 6947(c). See Snyder, *The EPA-North Carolina Dispute: The Right of States to Pass Stricter Laws Under the Resource Conservation and Recovery Act*, 8 VA. J. NAT. RESOURCES L. 171 (1988).

158. State laws may be preempted by federal laws where a congressional intent to preempt is express in the language of the statute or implicit in the statutory scheme. If the state regulation would constitute an obstacle to the accomplishment of the federal purpose, then the state law is barred. *See generally infra* notes 169–70 and accompanying text (discussion of federal preemption). Where the federal pollution control schemes do not address a particular area of environmental control, state regulation of that area is not likely to be an obstacle to

the federal environmental schemes are becoming increasingly comprehensive, there remain still a few areas not addressed by the federal statutes.¹⁵⁹ In these areas states may control environmental pollution through police power regulation.¹⁶⁰

III. APPLICABILITY OF STATE LAW

State programs established "in lieu of" federal programs under the federal pollution control acts comprise the bulk of state control of pollutants and pollution sources. Yet state extension of the "in lieu of" programs over Indian country is preempted in virtually all aspects.¹⁶¹ In many cases the federal preemption does not depend upon an analysis under the usual infringement/preemption test of federal Indian law, but is found directly in the acts themselves. In other instances, interpretations of the federal laws by EPA, and judicial review of those

accomplishment of the federal program. Those areas not covered by the federal statutory schemes thus fall within the authority of the state under its police power.

On federal preemption of state law under the pollution control acts, see generally Light, *Federal Preemption, Federal Conspiration Under the New Superfund Act*, 38 MERCER L. REV. 643 (1987); Comment, *Environmental Law: A Reevaluation of Federal Pre-emption and the Commerce Clause*, 7 FORDHAM URBAN L.J. 649 (1979); Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978).

159. For example, in a paper dated March 4, 1988, the Indian Affairs Working Group of the National Association of Attorneys General identified the following as subjects not covered by the federal pollution control acts: "[R]egulation and permitting of discharges to groundwater, shoreline management, cleanup of pesticides or petroleum wastes not covered by CERCLA, and regulation of non-point source pollution." NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, INDIAN AFFAIRS WORKING GROUP, EPA INDIAN LANDS POLICY: THE NEED FOR REEVALUATION AND REVISION 5 (1988) (footnotes omitted) [hereinafter NAAAG PAPER]. The year previous to the release of the NAAAG Paper, however, amendments to CWA required states to submit management plans for controlling nonpoint source pollution, and established grants to states pursuant to such plans for the protection of groundwater quality. See *supra* notes 126 & 143.

160. See, e.g., *New York State Pesticide Coalition v. Jorling*, No. 89-7143 (2d. Cir., 10 May 1989) (1989 U.S. App. LEXIS 6557) (state "right to know" laws requiring notification, posting of signs, and newspaper notice of pesticide use not preempted by FIFRA); Roberts, *Acid Rain Regulation: Federal Failure and State Success*, 8 VA. J. NAT. RESOURCES L. 1, 35-60 (1988) (describing Minnesota state acid rain regulations).

161. Divestment of state regulatory jurisdiction is not the sum of the issue. Equally offensive to many native peoples are the federal regulations themselves.

In the absence of clear congressional expression of applicability to Indian reservations, some native governments and commenters have argued that the provisions of the EPA statutes should not apply to native reservations at all. Additionally, some native nations have advanced the argument that any placement by the federal government of environmental restrictions on reservation lands or tribes would be inconsistent with the federal government's trust responsibility to America's native nations. See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942); FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMM'N, TASK FORCE FOUR: FEDERAL, STATE AND TRIBAL JURISDICTION 34 (1976); P. MAXFIELD, *supra* note 3, at 47.

interpretations, serve to block state extension of "in lieu of" programs over Indian country. Where neither the language of the statute nor EPA's interpretation of the statute bars state authority, the applicability of the "in lieu of" programs is determined by the judicial infringement/preemption test for state regulatory authority within reservation borders.

More stringent state laws permissible under the federal pollution control acts also are preempted directly where the federal law treats native governments as states. Where the federal statutes do not treat tribes as states, more stringent state laws nonetheless may be prohibited under EPA's interpretation of the federal pollution control scheme. Alternatively, more stringent state laws, along with supplemental state regulations not barred by the federal statutes, are precluded by the infringement/preemption test for general state regulatory authority.

A. Express Federal Preemption

In many cases, the federal pollution control laws directly preempt states from extending their jurisdiction onto native reservations under the "in lieu of" programs. As the federal pollution control acts come before Congress for reauthorization, amendments generally include language treating native tribes as states.¹⁶²

Under each of these laws, "states" are accorded jurisdiction to operate the applicable program within "state" borders. As a general principle of sovereignty, of course, no state may regulate in the territory of another.¹⁶³ Treating tribes as states, therefore, preempts any other state from asserting jurisdiction in the tribal territory. For example, if the Crow Tribe is a "state" for purposes of CWA programs, the State of Montana can no more assert jurisdiction over the Crow Reservation

162. Recent amendments to CERCLA, CWA, and SDWA, as well as the 1977 SMCRA, all include specific provisions that tribes may be treated as states for all or most purposes of the acts. See *supra* notes 148-51 and accompanying text. The EPA has stated that one of its goals in addressing pollution control in Indian country is to "[seek] amendments to environmental statutes in order to clarify the role of tribal governments in this area." U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF FEDERAL ACTIVITIES, EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 87, 2 (1988) [hereinafter EPA ACTIVITIES FY 87].

163. As with most state jurisdictional footings, common law adopts a territorial basis as the general precept of state regulatory jurisdiction. A state has the authority to regulate activities within its territorial limits. Conversely, there can be no territorial jurisdiction where the regulated conduct and its results occur outside a state's territory. See RESTATEMENT OF CONFLICT OF LAWS § 425 (1934). The Supreme Court has recognized this principle specifically in the context of pollution control. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (under CWA, states may administer their permit systems only with regard to in-state sources); see also *infra* note 173.

than Montana can over its neighboring state of Wyoming. As “state equivalents” under the federal acts, tribes may assume responsibility for implementing and enforcing the pollution control programs within reservation borders.¹⁶⁴ The assumption of primary responsibility by two governments—state and tribal—aside from the inherent inconsistency, would frustrate federal intent and conflict with the plain language of the acts that tribes are to be treated as states.

Not all the federal pollution control acts contain general statutory provisions authorizing the federal implementing agency to treat tribes as states. Some federal laws instead include specific language concerning tribal participation in particular programs. The CAA, for example, provides that only the governing body of a native nation may redesignate an air quality attainment area within reservation borders, and thus CAA expressly preempts any attempt by a state to redesignate reservation lands.¹⁶⁵ The FIFRA provides that, like a state, a tribe may enter into a cooperative agreement with EPA to enforce the Act.¹⁶⁶

Preemption of state jurisdiction under these aspects of the federal pollution control acts more closely resembles traditional principles of federal preemption than the specialized preemption doctrine developed for domestic Indian law.¹⁶⁷ Because of the presumption against state jurisdiction within reservation borders,¹⁶⁸ express federal preemption of the states is rare in native affairs. By equating tribes with states, however, or otherwise placing sole authority with the tribes, Congress overtly has preempted state jurisdiction in Indian country under several of the state “in lieu of” programs.

Under traditional principles of preemption, state regulation is preempted entirely by federal law where Congress “‘unmistakably’” has

164. See, e.g., 42 U.S.C.A. § 300j-11(a) (West Supp. 1988) (SDWA, providing that EPA “is authorized to treat Indian Tribes as States under this subchapter, [and] may delegate to such Tribes primary enforcement responsibility for public water systems and for underground injection control.”). The EPA recently promulgated final rules for treating tribes as states and for tribal primacy under these two programs. 53 Fed. Reg. 37,396 (1988).

165. See *supra* note 154.

166. 7 U.S.C. § 136u(a) (1982). Presumably the federal government would not enter into two cooperative agreements—one with the state and another with an adjoining tribe—to enforce the Act within a tribal territory. Such a system of dual agreements could result in potentially conflicting regulatory schemes, and would appear to frustrate the intent of the law that native nations may enter into cooperative agreements for tribal enforcement within their territories. On the federal government’s disfavor of dual tribal-state regulatory schemes, see *supra* notes 55 & 97 (general regulation), and *infra* note 235 (environmental regulation).

167. See *supra* note 75 (discussing the difference between standard preemption and preemption in domestic Indian law).

168. See *supra* notes 69–70 and accompanying text.

ordained federal control, whether congressional intent is explicit in the language of the statute or implicit in the statutory structure and purpose.¹⁶⁹ Moreover, even where federal law does not override state law completely, state regulation still may be barred if compliance with both is a physical impossibility or if the state law stands as an obstacle to the accomplishment of the federal purpose.¹⁷⁰

In the case of the federal pollution control laws, congressional intent that tribes, not states, carry out the federal mandate within Indian country can be either express in the language of statutes, such as CAA redesignation provisions, or implicit in the general tribes-as-states scheme established in statutes such as CWA. While states are not prohibited from regulating altogether, as they would be in traditional preemption law, they are barred, whether explicitly or implicitly, from regulating in native territory.

The preemption of state jurisdiction found in the tribes-as-states statutes and similar provisions of other laws is not "express" preemption in the usual sense of that term, in that no language in the statutes specifically and expressly provides that the state may not regulate in Indian country. But neither does preemption under these federal laws resemble Indian law preemption, which relies upon an examination of the "backdrop" of tribal sovereignty and a balancing of the interests of the federal, tribal, and state governments to determine whether state authority is barred.¹⁷¹ None of this analysis is necessary in the case of the tribes-as-states laws, because the express language of the statutory schemes bars any state jurisdiction in Indian country. The direct nature of the preemption found in many of the pollution control acts thus resembles standard preemption law to a degree unusual in federal Indian law.

This preemptive effect of the tribes-as-states language in the pollution control acts is not diminished where a state's laws are more stringent than the federal standards.¹⁷² The mere fact of stricter pollution controls does not authorize a state to apply its "in lieu of" laws on a reservation, any more than the state could apply those laws to an adjacent state. One state is not entitled to regulate in the territory of another state under the federal acts merely because the first state's laws offer greater protection, even if those states with more stringent

169. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

170. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Rath Packing*, 430 U.S. at 526.

171. See *supra* notes 76-79 and accompanying text.

172. See also *infra* notes 237-38 and accompanying text (addressing more stringent state laws under the federal pollution control acts that do not treat tribes as states).

standards are impacted adversely by neighboring jurisdictions that adopt the federal minimums.¹⁷³ The statutory treatment of tribes as states, or similar grants of exclusive authority to tribes, mandates the same result with respect to Indian country. Thus, under the federal statutes that treat tribes as states, more stringent standards or requirements enacted by a state cannot be enforced in Indian country.

In some instances, the federal grant of statutory program authority¹⁷⁴ applies to any federally recognized native nation.¹⁷⁵ In other of the federal acts, however, particularly those amended during reauthorization to treat tribes as states, only those native nations meeting certain statutory criteria may qualify as states.¹⁷⁶ Generally, the criteria include federally-recognized tribal governments exercising substantial governmental functions, jurisdiction over the subject matter of the program, and the perceived capability to carry out the program.¹⁷⁷ The extent to which these statutory limitations will impact native nations wishing to take advantage of the federal programs is not yet known.¹⁷⁸

173. See, e.g., *Illinois v. City of Milwaukee*, 731 F.2d 403, 413 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (under CWA, state has no right to impose more stringent regulations upon sources in neighboring state); *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981) (under CAA, state is under no obligation to respect its neighbor's more stringent air quality standards).

174. In speaking of a federal "grant" of authority, it is not the authors' intention to imply in any way that native nations are dependent upon a delegation of power from the federal government in dealing with reservation environmental issues. In the case of the federal pollution control laws, however, there is a "grant" of federal authority—that is, a delegation of authority to carry out the programs established by federal law. It is a delegation to the tribes of federal statutory authority and not an attempt to confer on the native nations that which is already theirs. See generally *supra* Section I.B.2. (discussion of federal delegation to tribal governments).

175. Under CAA, area air quality redesignation of reservations rests exclusively with the "Indian governing body" of "federally recognized Indian tribes." 42 U.S.C. § 7474(c) (1982). And under SMCRA, the Department of the Interior may treat as a state an "Indian tribe," 30 U.S.C. § 1235(k) (1982), defined as "any Indian tribe, band, group, or community having a governing body recognized by the Secretary." *Id.* § 1291(10). Consideration of tribes as states under SMCRA, however, logically is limited to tribes having within their jurisdictions eligible or coal producing lands to which SMCRA applies. See *supra* note 153.

176. See CWA, 33 U.S.C.A. § 1377(e) (West Supp. 1988); SDWA, 42 U.S.C.A. § 300j-11(b) (West Supp. 1989); see also SARA, 42 U.S.C.A. § 9604(d)(1)(A) (West Supp. 1989).

177. See *supra* note 152.

178. The EPA recently estimated that within a 10-year period it expects approximately 36 tribes to be interested in acquiring delegation under one or more of the federal programs. U.S. ENVIRONMENTAL PROTECTION AGENCY, ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN LANDS: EPA INDIAN WORK GROUP DISCUSSION PAPER 21 (1983) [hereinafter EPA DISCUSSION PAPER].

The statutory program limitations may have an especially hard impact on nonrecognized native communities in the country. The federal government recognizes only about 300 of the estimated 400 tribes and bands in the United States today. 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 461 (1977). Of the approximately 100 nonrecognized native communities, about one quarter have land bases. *Id.* at 467, 474. For want of formal

At the present time, therefore, direct federal preemption of state pollution control authority in Indian country is not universal, either as to programs or as to tribes. Some of the federal acts do not directly prohibit states from regulating conduct in Indian country.¹⁷⁹ Those statutes that do directly bar state incursions by treating tribes as states do not necessarily reach all affected native nations. Where direct federal preemption is not clear, the applicability of a particular state "in lieu of" program in Indian country will depend upon one of two factors. If EPA has developed and implemented a regulatory policy concerning state authority over reservation lands under the particular pollution control act, the agency's interpretation and judicial review of that interpretation will determine state jurisdiction. If no EPA interpretation exists, however, a state's imposition of "in lieu of" programs in Indian country will be determined by the infringement/preemption test for general state regulatory authority within reservation borders.¹⁸⁰

B. Deference to Agency Statutory Interpretation

There are three basic situations where EPA's interpretation of the federal pollution control laws affects the reach of state "in lieu of" programs: (1) statutes such as CAA, FIFRA, and RCRA, that in whole or in part do not treat tribes as states; (2) statutes such as CERCLA, CWA, SDWA, and SMCRA that do include specific provisions that tribes be treated as states, but that exclude certain tribes which do not meet the statutory criteria for assuming primacy; and (3) the latter group of statutes, with regard to tribes that meet the statutory criteria, but have not yet assumed primacy.¹⁸¹

recognized status, however, these native homelands likely will be excluded from consideration for federal grants of tribal environmental program authority.

Virtually all of the 100 nonrecognized communities, scattered across 30 states, and comprising some 100,000 native members, actively are seeking federal recognition of their tribal status. See generally THE NEWBERRY LIBRARY, CENTER FOR THE HISTORY OF THE AMERICAN INDIAN, OCCASIONAL PAPERS SERIES, No. 7, NONRECOGNIZED AMERICAN INDIAN TRIBES: AN HISTORICAL AND LEGAL PERSPECTIVE (F.W. Porter III, ed. 1983).

179. Specifically, RCRA and CAA do not contain express prohibitions. See *supra* notes 154 & 156 and accompanying text.

180. See *supra* Section I.C.1.

181. In only one instance does a federal statute directly address authority on Indian lands in these instances. The SDWA provides that until a native nation assumes primary enforcement responsibility for the underground injection control program, the currently applicable UIC program shall continue to apply. 42 U.S.C.A. § 300h-1(e) (West Supp. 1989). As noted earlier, states may assume primacy over UIC programs within their borders. See *supra* note 151. Nonetheless, SDWA regulations provide that EPA may promulgate an alternative UIC program

The EPA has interpreted the federal pollution control acts in two ways that fundamentally affect the operation of state programs within reservation borders. First, EPA asserts that the federal acts do not give the states any regulatory authority in Indian country, and that any state that wishes to implement its "in lieu of" programs on native lands must demonstrate independent authority to do so. Second, EPA on occasion has determined that the federal acts authorize it to delegate program authority to native nations, even though the federal law, on its face, does not treat tribes as states. Each of these agency interpretations effects a preemption of state authority within native territory.

1. *Federal Primacy in Indian Country*

The general position of EPA is that where native nations cannot or do not assume program management, EPA, and not the state, has primary enforcement responsibility within Indian country.¹⁸² Based on President Reagan's Indian policy of government-to-government relations,¹⁸³ EPA posits that a state may take primacy within reservation

for Class II wells on Indian lands, 40 C.F.R. § 144.2 (1986), and that states may take UIC primacy even though they are unable to regulate UIC activities on Indian lands. *Id.* § 145.21(f).

In practice, EPA generally administers the UIC program for all types of wells on native lands, even where the state has assumed primary responsibility for the UIC program under the Act. *See, e.g.*, 40 C.F.R. § 147.101(a) (1987) (Alaska); *id.* § 147.151(a) (Arizona); *id.* § 147.251(a) (California); *id.* § 147.301(a) (Colorado); *id.* § 147.651(a) (Idaho); *id.* § 147.801(a) (Iowa); *id.* § 147.1151(a) (Michigan); *id.* § 147.1351(a) (Montana); *id.* § 147.1401(a) (Nebraska); *id.* § 147.1451(a) (Nevada); and *id.* § 147.2101(a) (South Dakota); *see also* 53 Fed. Reg. 43,084 (1988) (extending the federal UIC program to most native lands); *id.* at 43,080 (rejecting Washington State's application to extend its state UIC program to Indian country).

182. U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 2 (1984) [hereinafter EPA INDIAN POLICY]; *see also* U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM STRATEGY FOR IMPLEMENTATION OF THE EPA INDIAN POLICY 2-3, 11 (1985) [hereinafter EPA INTERIM STRATEGY]; EPA DISCUSSION PAPER, *supra* note 178, at 17; U.S. E.P.A. General Counsel Opinion No. 78-2 (Mar. 6 1978).

183. President Reagan announced his Indian policy on January 24, 1983. 19 WEEKLY COMP. PRES. DOCS. 98, 99 (1983) ("Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination."). The policy reiterates that tribes have the primary responsibility for meeting the needs of their people and for developing and managing reservation resources. *Id.* "This administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs." *Id.* For criticism of Reagan's Indian policy as little more than a means to reduce or eliminate federal responsibilities to native tribes, *see* Jorgensen, *Federal Policies, American Indian Politics and the "New Federalism,"* 10 AM. INDIAN CULTURE & RES. J. 1 (1986); Williams, *Reagan's Initiatives Lead to More Questions than Answers*, 250 INDIAN TRUTH 4 (Apr. 1983).

In response to the new federal affirmation of tribal governmental status, EPA announced its Indian policy on November 8, 1984. EPA INDIAN POLICY, *supra* note 182, at 1; *see also* NATIONAL CONGRESS OF AMERICAN INDIANS, REPORT OF THE CONFERENCE ON

borders under an "in lieu of" program only if the state can demonstrate to EPA's satisfaction that the state is entitled to regulate in Indian country under independent authority.¹⁸⁴ The federal pollution control acts, in and of themselves, do not constitute a grant to the states of any authority or jurisdiction over reservation lands.¹⁸⁵

The EPA's insistence on an independent basis for any assertion of state authority finds its strongest expression in pronouncements on RCRA, one of the federal pollution control acts that does not treat tribes as states. In 1980 EPA announced that it would assume that a state lacked authority to regulate hazardous wastes within Indian country unless the state affirmatively asserted that it had jurisdiction, and supported that assertion with a legal analysis from the state attor-

ENVIRONMENTAL PROTECTION IN INDIAN COUNTRY 13 (1987) (sponsored by U.S. E.P.A. Region V (Chicago) [hereinafter REGION V CONFERENCE]. In a document outlining implementation strategies for its policy, EPA noted that "forcing tribal governments to act through state governments that cannot exercise jurisdiction over them is not an effective way of implementing programs overall, and certainly is in opposition to the federal policy of working with tribal governments directly." EPA INTERIM STRATEGY, *supra* note 182, at 11. The EPA was then, and remains still, the only federal agency to have developed its own policy implementing the presidential statement. *Cf.* U.S. Dep't of Interior, National Park Service, *Native American Relationships Management Policy*, 52 Fed. Reg. 35,674 (1987) (establishing policy of consultation with tribes and consideration of native interests and concerns).

While EPA policy professedly is grounded in Reagan's policy statement, EPA's position is supported as well by the federal trust responsibility to the native nations. For a discussion of the trust doctrine generally, see *supra* note 21, and for a discussion of the federal-native trust obligation relative to environmental matters, see *infra* notes 268-69 and accompanying text.

184. See, e.g., Hazardous Waste Management System: General, 45 Fed. Reg. 33,066, 33,378 (1980) ("Because States will lack jurisdiction, in most instances, to control activities on Indian lands . . . EPA will assume that a State lacks authority unless the State affirmatively asserts authority and supports its assertion with an analysis from the State Attorney General."). The basis of EPA's position is found in its Indian policy statement: "EPA recognizes Tribal Governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units." EPA INDIAN POLICY, *supra* note 182, at 2.

185. EPA DISCUSSION PAPER, *supra* note 178, at 9 ("Although Congress can give authority to state governments to regulate reservation affairs, it must do so specifically, in clear and express terms. This, the environmental statutes do not do.").

The EPA presumption against state jurisdiction in Indian country absent clear congressional approval has a long and strong grounding in case law. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 n.18 (1987) (state laws may reach into Indian country "if Congress expressly has so provided"); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) ("[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply") (citation omitted); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation"); see also *WILKINSON*, *supra* note 22, at 93-106.

ney general.¹⁸⁶ The State of Washington, traditionally hostile to native interests,¹⁸⁷ claimed that upon federal authorization of its hazardous waste management plan, the state would be entitled to implement its program on native reservations.¹⁸⁸ The EPA rejected Washington's contention that either RCRA itself or federal authorization of the state plan conferred jurisdiction on the state, and instead retained federal authority to implement RCRA programs on reservation lands.¹⁸⁹ In subsequent final authorizations of state hazardous

186. Hazardous Waste Management System: General, 45 Fed. Reg. 33,066, 33,378 (1980); see also 40 C.F.R. § 271.125(c) (1986) (requiring an analysis of the state's authority whenever a state seeks to extend the state RCRA program to native lands).

The requirement that the state attorney general analyze the state's jurisdiction whenever the state seeks to implement its "in lieu of" programs in Indian country has become a general one. See 40 C.F.R. § 123.23(b) (1986) (Clean Water Act NPDES program); 233.23(b) (CWA § 404 permit program); *id.* § 145.24(b) (SDWA regulations).

187. See, e.g., EPA DISCUSSION PAPER, *supra* note 178, at 27 n.6; REGION V CONFERENCE, *supra* note 183, at 36. Most recently, Washington Attorney General Ken Eikenberry, writing on behalf of the Indian Affairs Working Group of the National Association of Attorneys General, called on the Administrator of EPA to revise the EPA Indian policy to permit states to take an active role in regulating reservation environments. NAAG PAPER, *supra* note 159.

The State of Washington's opposition to native interests traditionally has not been confined to the environmental arena. See, e.g., Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1125 (9th Cir. 1978) (with the exception of the desegregation cases, the State of Washington put forth "the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century"). For a brief overview of the Washington political context in which these treaty issues fester, see Ott, *Indian Fishing Rights in the Pacific Northwest: The Need for Federal Intervention*, 14 B.C. ENV'TL AFFAIRS L. REV. 313 (1987).

Despite Washington's national reputation to litigate every last detail on native issues in that state, and its persistent unwillingness to cooperate with native nations, the state appears recently to have reconsidered its previous recalcitrance. In January 1989, Washington issued a new "State/Tribal Governmental Relations Policy," acknowledging the "fundamental principle and integrity of the government-to-government relationship between the State and the Indian Tribes." Washington Governor Gardner, in announcing the policy, noted that it presented "a clear demarcation from old habits of confrontation to new habits of cooperation." See Friends Committee on National Legislation, *Puyallup Land Settlement: Cooperative Wave of the Future*, I-32 INDIAN REP. 8 (Spring 1989).

188. Washington; Phase I and Phase II, Components A and B, Interim Authorization of the State Hazardous Waste Management Program, 48 Fed. Reg. 34,954, 34,956 (1983).

189. *Id.* at 34,957:

Contrary to the State's argument, EPA concludes that RCRA and the act of authorization do not convey to the State any authority relative to Indian lands jurisdiction. States must independently obtain such authority expressly from Congress or by treaty. The State has not demonstrated such authority and to EPA's knowledge has not been granted such authority. EPA, therefore, will retain jurisdiction for operating the Federal program on Indian lands in the State of Washington.

Despite EPA's rejection of the state's hazardous waste authority in Indian country, and the judicial affirmation of that rejection, see *infra* notes 191-200 and accompanying text, Washington State subsequently claimed authority to extend its SDWA underground injection control program over native lands. See 53 Fed. Reg. 43,080 (1988). The State raised the same arguments that it had raised in its earlier RCRA application. The EPA denied the State's SDWA application, finding the State's position "weaker than the same argument under RCRA" because the

waste management plans, EPA consistently and expressly has retained jurisdiction in Indian country on the ground that the states have no federal authority to operate RCRA programs on reservation lands.¹⁹⁰

Angry at EPA's rejection of the state's asserted jurisdiction, the state of Washington sued. In *Washington Department of Ecology v. United States Environmental Protection Agency*,¹⁹¹ Washington claimed that the language and management scheme of RCRA permit a state to enforce its program "in lieu of" the entire federal program, including that portion of the federal program applicable on native reservations.¹⁹² The Ninth Circuit, relying primarily upon principles of administrative law buttressed by tribal sovereignty, held that EPA's refusal to allow Washington to regulate in Indian country was proper.¹⁹³

The court noted that both RCRA itself and the statute's legislative history are silent on the issue of state regulatory authority over reservation lands.¹⁹⁴ Under generally accepted principles of administrative law, when a statute is silent or ambiguous, the courts must defer to the

1986 SDWA amendments reflected congressional intent to promote tribal regulation in Indian country. *Id.* at 43,081.

190. *See, e.g.*, 51 Fed. Reg. 3779, 3780 (1986) (Oregon); *id.* at 3782, 3782-83 (Washington); *id.* at 3783, 3784 (Wisconsin); *id.* at 36,804, 36,805 (Michigan).

The EPA has taken the same stance with regard to approval of state air quality control plans for the prevention of significant deterioration of air quality ("PSD"). The Agency uniformly has retained authority for issuing PSD permits in Indian country. *See* 40 C.F.R. § 52.96(b) (1986) (Alaska); *id.* § 52.144(b) (Arizona); *id.* § 52.683(b) (Idaho); *id.* § 52.884(a)(1) (Kansas); *id.* § 52.1382(b) (Montana); *id.* § 52.1436(a) (Nebraska); *id.* § 52.1829 (North Dakota); *id.* § 52.2346 (Utah); *id.* § 52.2630(b) (Wyoming). The EPA also has retained authority under SDWA over the underground injection control program for all classes of wells on native lands. *See supra* note 181.

While partial state programs are not permitted under RCRA final authorization, EPA has ruled that the lack of state authority to regulate in Indian country does not affect final authorization. "[I]nability of a State to regulate activities on Indian lands does not constitute a partial program." 40 C.F.R. § 271.1(h) (1986). Similarly, partial state programs are not allowed under CWA, for either the NPDES or the § 404 permit programs. The EPA has inserted in the regulations governing these programs language identical to that found in the RCRA regulation. 40 C.F.R. § 123.1(h) (1986) (NPDES program); *id.* § 233.20(i) (§ 404 program). A similar provision in the regulations for SDWA permits a state to assume primacy for underground injection control programs even though the state has no authority to regulate UIC activities on Indian lands. *Id.* § 145.21(f).

191. 752 F.2d 1465 (9th Cir. 1985). The case has generated considerable attention in the literature, both pro and con. *See supra* note 3.

192. *Washington DOE*, 752 F.2d at 1467. In support of its argument, the state cited RCRA's preference for state administration of hazardous waste programs, the authorization of state programs "in lieu of" the federal program, the statutory right of a state to adopt more stringent requirements, and the failure of the statute expressly to preserve tribal regulatory powers in the same way it specifically did preserve state regulatory powers.

193. *Id.* at 1467-68.

194. *Id.* at 1469.

interpretation of the agency charged with administering the statute, so long as the agency's interpretation is reasonable.¹⁹⁵ Under this deferential standard of review, the court ruled that EPA's interpretation that RCRA does not grant the states any regulatory authority over native nations was a reasonable construction of the statute.¹⁹⁶

In affirming the reasonableness of the EPA interpretation, however, the court did not rely solely upon traditional principles of deference to the agency, but held as well that both federal Indian law and federal Indian policy supported EPA's stance.¹⁹⁷ The Ninth Circuit examined these federal policies and the "backdrop" of tribal sovereignty, the concept central to present-day judicial determinations of state ability to regulate within reservation borders,¹⁹⁸ as they affected EPA's interpretation of the hazardous waste statute. Specifically, the court referred to: the general principle that states do not have jurisdiction over natives and native land absent an express congressional grant; the federal trust responsibility toward native nations; what it called "[r]espect for the long tradition of tribal sovereignty and self-

195. *Id.* Traditionally, the construction of a statute by the agency charged with its administration is entitled to substantial deference. *Young v. Community Nutrition Inst.*, 476 U.S. 974, 981 (1986). A reviewing court must defer unless the agency interpretation is inconsistent with the statute or would frustrate congressional policy. *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 125-26 (1985). Regardless whether it is the only or the better interpretation, a reasonable interpretation by the administering agency must be upheld. *Id.* at 125. For an excellent precis on judicial "deference" to administrative interpretations of law, see 5 K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* 399-404 (1984).

Where native issues are involved, traditional canons of statutory construction dictate that legislation impacting on natives should be construed liberally and the resolution of statutory ambiguities is to be found in the tribes' favor. *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 354 (1941); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918). See generally De La Hunt, *Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REF. 681 (1984).

196. *Washington DOE*, 752 F.2d at 1469. The Ninth Circuit stated:

Applying this deferential standard of review, we hold that EPA reasonably has interpreted RCRA not to grant state jurisdiction over the activities of Indians in Indian country. The statutory language cited by Washington does not express Congressional intent to extend state jurisdiction with sufficient clarity for us to conclude that the agency's interpretation is wrong. Implementation of hazardous waste management programs on Indian lands raises questions of Indian policy as well as environmental policy. It is appropriate for us to defer to EPA's expertise and experience in reconciling these policies, gained through administration of similar environmental statutes on Indian lands.

197. *Id.* at 1469-72. Using a similar combination of deference to agency interpretation and reliance on principles of tribal sovereignty, the Ninth Circuit previously had upheld EPA's delegation to the Northern Cheyenne Tribe of redesignation authority under CAA. *Nance v. EPA*, 645 F.2d 701, 712-14 (9th Cir.), cert. denied sub nom. *Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981). The Northern Cheyenne issue arose prior to the 1977 amendments to CAA that provided statutorily for tribes to take exclusive redesignation authority over reservation lands. See 42 U.S.C. § 7474(c) (1982).

198. See *supra* notes 76-79 and accompanying text.

government;" the current federal policy of promoting tribal self-government, both in general and specifically with regard to environmental matters; EPA's commitment to the federal position, in theory and in practice; and the strong tribal sovereign interest in managing the reservation environment.¹⁹⁹ All of these factors, the court stated, supported EPA's interpretation of RCRA as not granting to the states any authority to implement their "in lieu of" hazardous waste programs on reservation lands.²⁰⁰

One disgruntled commenter quickly pointed out that the case is limited both procedurally and substantively. First, the commenter noted that the procedural posture of the case was on appeal from an agency ruling. Therefore, the decisive factor in the court's decision was the administrative law principle of deference to agency interpretation of statutes.²⁰¹ While this technically is correct, the court's strong reliance on tribal sovereignty to support the reasonableness of EPA's action suggests judicial recognition of tribal interests in environmental matters beyond mere deference to EPA.²⁰² The commenter's substantive argument rests on the court's disclaimer that its decision would determine only state authority over natives on reservations, and not the possible reach of state hazardous waste jurisdiction over non-natives in Indian country.²⁰³

During the *Washington DOE* litigation, the state raised the argument that it should at least have authority over non-natives, but it did

199. *Washington DOE*, 752 F.2d at 1469-72.

200. *Id.* at 1472.

201. Allen, *supra* note 3, at 69-70, 83. Allen, noting that the court did not address "the more difficult question of whether a state may assert its own police power, independent of RCRA, to regulate wastes on reservations," takes as her thesis the assertion that principles of Indian law preemption support state regulation of hazardous waste in Indian country. *Id.* at 70. Whether state police power regulation of pollutants in Indian country is permissible under the infringement/preemption test is discussed *infra*, Section III.C.

202. See *infra* Section III.C. (discussion of preemption of state regulation).

203. *Washington DOE*, 752 F.2d at 1467-68:

We hold today that the EPA Regional Administrator properly refused to approve the proposed state program because RCRA does not authorize the states to regulate Indians on Indian lands. We do not decide the question whether Washington is empowered to create a program reaching into Indian country when that reach is limited to non-Indians.

See Allen, *supra* note 3, at 97-103 (positing that courts should find that states have "jurisdiction to regulate the hazardous waste activities of at least non-Native Americans on Native American lands if the state presented its regulatory program as an exercise of the state's police powers"). But see *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1110-11 (arguing that tribal governments are the proper regulatory authority for non-native hazardous waste within reservation borders).

so too late for the circuit court to address the question.²⁰⁴ Subsequent to the court's decision, Washington raised the issue again, this time in its application to EPA for final authorization under RCRA of its state hazardous waste management program.²⁰⁵ The EPA asserted, as it had continually, that absent independent state authority to regulate within reservation borders, EPA would retain jurisdiction under RCRA to regulate "on Indian lands."²⁰⁶ The term "Indian lands," EPA explained, was synonymous with Indian country: that is, it encompassed all lands, including fee lands, within reservation borders, all dependent Indian communities, and all Indian allotments.²⁰⁷ The EPA had presented this definition of "Indian lands" to the court in *Washington DOE*, and the court had accepted it as a reasonable

204. Allen, *supra* note 3, at 96 n.170.

Washington State is a foremost advocate of "checkerboard" jurisdiction—where the state regulates non-natives within tribal territory—and has been adamant in its insistence that native governments retain no control over non-native persons and non-native lands on tribal reservations. On the checkerboard jurisdiction problem, see *infra* note 212.

205. Washington; Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 3782, 3783 (1986) ("Based on the Court's decision [in *Washington DOE*], the State amended their [sic] application to focus their [sic] assertion on authority to cover non-Indian hazardous waste management activities on Indian lands.").

206. *Id.* The EPA's use of the term "on Indian lands" had been consistent since the promulgation of general rules for state hazardous waste management plans. See 45 Fed. Reg. 33,066, 33,378 (1980); see also 40 C.F.R. § 271.1(h) (1986).

207. 51 Fed. Reg. at 3783: "EPA view[s] 'Indian lands' to mean all lands (including fee lands) within Indian reservations, dependent Indian communities, and Indian allotments to which Indians hold title." The EPA's definition is a somewhat abbreviated version of the statutory definition of "Indian country," which includes:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (1982). In other instances, EPA has defined "Indian lands" simply by incorporating the definition of "Indian country." See 40 C.F.R. § 144.3 (1986) (SDWA regulations) ("Indian lands means 'Indian country' as defined in 18 U.S.C. 1151"). Tribal leaders have suggested, in fact, that EPA substitute the term "Indian country" for any other synonym in order to avoid confusion and possible future conflict.

The tribal governments request that EPA use the term "Indian country" when referring to Indian lands, rather than the term "Reservation" or other possible terms which could exclude extensive Indian territory. "Indian country" is an understandable term of art in law. Use of other terms could serve to create confusion in definitions and jurisdiction, and possibly could lead to law suits or legislative clarification which could be avoided by the use of the standardized "Indian country" term.

REGION V CONFERENCE, *supra* note 183, at 9 (tribal recommendation no. 11).

demarcation of state authority.²⁰⁸ Thus, based on its interpretation of the limits of state authority, buttressed by judicial acceptance, EPA denied Washington's assertion of hazardous waste authority over non-natives on native lands.²⁰⁹

Because the state cannot assert RCRA jurisdiction over non-native persons in Indian country without also asserting jurisdiction over the land on which the activities occur, EPA's interpretation of the statute bars any attempt by the state to implement its RCRA program within Indian country. In large part, EPA's interpretation of "Indian lands" already has been found reasonable by the courts.²¹⁰

Further judicial review should result in an identical conclusion. Deference to the implementing agency requires that the court affirm the agency's interpretation so long as it is reasonable. The reasonableness of EPA's definition of "Indian lands" is apparent in a number of factors: federal encouragement and promotion of tribal self-governance; the current state of the law concerning tribal jurisdiction over non-natives within reservation boundaries,²¹¹ particularly important where EPA merely is administering a federal pollution control program until authority is assumed by the tribe; a recognition of strong tribal interests in sovereignty over the entirety of the tribal territory; and an understanding that checkerboard environmental authority within reservation boundaries would result in multiple practical difficulties.²¹² The "backdrop" of tribal sovereignty and the practical real-

208. "We accept this definition as a reasonable marker of the geographic boundary between state authority and federal authority." *Washington DOE*, 752 F.2d at 1467 n.1. The court's position appears inconsistent with its subsequent insistence that it was not determining state power "to create a program reaching into Indian country when that reach is limited to non-Indians." *Id.* at 1468. If the Ninth Circuit accepts EPA's retained jurisdiction over "Indian lands" as reasonable, and also accepts as reasonable EPA's definition of "Indian lands" as including fee lands, then it is difficult to perceive which non-natives could be regulated by the state in any event. If EPA retains program jurisdiction over all the lands, then the fact that the state might have authority over persons on those lands would seem irrelevant. The state could not implement its authority over the person without impinging upon EPA's authority over the land.

209. 51 Fed. Reg. at 3783.

210. *Washington DOE*, 752 F.2d at 1467 n.1.

211. See *supra* Section I.B.3.

212. See EPA DISCUSSION PAPER, *supra* note 178, at 91, noting that checkerboard jurisdiction "must be weighed by EPA in terms of the practical difficulties of regulating the environment with two different sets of rules based on racial lines—Indians and non-Indians." In determining that federal primacy extends to all "Indian lands," EPA has weighed this factor and determined that checkerboard jurisdiction is inappropriate.

The Supreme Court has addressed the identical problems with checkerboard enforcement in the context of criminal jurisdiction over reservation lands:

[E]nforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though

ities of program administration support EPA's interpretation of RCRA that the federal agency, and not the states, has primacy over non-natives in Indian country.

Thus far, conflict and litigation over the state's environmental regulatory role in Indian country have occurred primarily in the context of RCRA. But EPA's position that states have no "in lieu of" program authority on reservations without a separate grant of jurisdiction from Congress, is not limited to hazardous waste authority. In regulations implementing many of the federal environmental programs, EPA asserts that states may only assume primacy in Indian country if they can demonstrate independent regulatory jurisdiction over reservation lands.²¹³ Absent that demonstration, EPA consistently has maintained the primacy of federal program authority within reservation borders.²¹⁴ No reason exists or has been advanced for courts to treat EPA's interpretation of other federal pollution control laws differently than the Ninth Circuit treated the agency's interpretation of RCRA.²¹⁵ Thus, judicial deference to agency interpretation of the

committed within the reservation, is in the State or Federal Government. Such an impractical pattern of checkerboard jurisdiction [is] contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction.

Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962) (footnotes omitted). *But see* *Washington v. Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979) (upholding Washington's assumption of checkerboard Public Law 280 jurisdiction over fee lands within the reservation as not antithetical to law enforcement).

213. In addition to RCRA, EPA specifically has asserted this position with regard to CWA, 40 C.F.R. §§ 123.23(b), 233.23(b) (1986); FIFRA, 40 C.F.R. § 171.10(b), (d) (1986); and SDWA, 40 C.F.R. § 145.24(b) (1986) and 52 Fed. Reg. 17,684 (1987). Under SMCRA, states cannot assert regulatory authority in Indian country without the express permission of the tribes. *See* 30 C.F.R. § 229.105 (1988) ("In the case of a State seeking a delegation of authority for Indian lands . . . the State petition to the Secretary [of the Interior] must be supported by an appropriate resolution or resolutions of tribal councils joining the State in petitioning for delegation . . ."). Tribal consent may be withdrawn at any time:

If at any time an Indian tribe . . . determines that it wishes to withdraw from the State delegation of authority in relation to its lands, it may do so by sending a petition of withdrawal to the State. Once the petition has been received, the State shall within 30 days cease all activities being carried out under the delegation of authority.

Id. § 229.106.

214. In addition to its authority under RCRA, EPA retains federal primacy under CAA for prevention of significant deterioration permit authority on Indian lands, *see supra* note 190; under CWA for NPDES and § 404 permit programs, 40 C.F.R. §§ 123.1(h), 233.20(i) (1986); and under SDWA for underground injection control programs, 40 C.F.R. § 145.21(f) (1986). Similarly, the Secretary of the Interior retains "responsibility for the administration of the Federal program on Indian lands" under SMCRA. 30 C.F.R. § 701.4(h) (1988).

215. *Washington DOE*, 752 F.2d at 1469. In fact, prior EPA actions with regard to environmental programs in Indian country have been affirmed by the court under similar combined principles of administrative law and domestic Indian law. *See* *Nance v. EPA*, 645 F.2d 701 (9th Cir.), *cert. denied sub nom.* *Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981) (upholding as reasonable EPA's delegation to tribe of redesignation authority under CAA).

federal pollution control acts, bolstered by the "backdrop" of strong tribal sovereign interests in regulating the entirety of the reservation environment, should lead to affirmance of EPA's stance as reasonable agency action.

2. *Delegation of Program Authority to Native Governments*

The overall policy of EPA is to treat tribes as states, and to delegate program responsibilities to native nations wherever possible.²¹⁶ The EPA has not limited this aspect of its policy to those programs that statutorily treat tribes as states, but has interpreted the federal pollution control acts broadly in light of President Reagan's government-to-government federal Indian policy.²¹⁷ Thus, where federal statutes are silent regarding treatment of tribes as states, EPA may choose to interpret the laws as permitting it to delegate program authority to native governments.

This issue was addressed specifically in *Nance v. Environmental Protection Agency*,²¹⁸ in which a number of energy companies challenged

Similarly, the power of the Secretary of the Interior to interpret SMCRA with respect to Indian lands has been affirmed. *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1363-65 (D.C. Cir. 1980).

216. EPA INDIAN POLICY, *supra* note 182, at 2:

EPA recognizes Tribal Governments as sovereigns with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with Tribal Governments as the independent authority for reservation affairs, and not as political subdivisions of States or other governmental units.

....

The Agency will encourage Tribes to assume delegable responsibilities, (*i.e.* responsibilities which the Agency has traditionally delegated to State Governments for non-reservation lands) under terms similar to those governing delegations to States.

217. EPA DISCUSSION PAPER, *supra* note 178, at 35-36:

The Agency will endeavor where appropriate to give tribal governments the primary role in environmental program management and decision-making relating to EPA's delegable programs on reservation lands.

The President has stated his support of Indian self-determination and the proposition that tribal governments should play the primary role in Indian affairs. Except where other factors particular to the case are such as to render tribal management unreasonable or inappropriate, tribal governments should be the first choice for the primary management role in reservation programs, to the extent that individual tribal governments elect to assume that role.

See also REGION V CONFERENCE, *supra* note 183, at 16 ("The Agency will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations."). One of the examples given in the Region V Conference proceedings is a pilot project for solid and hazardous waste management on the Menominee Reservation. *Id.* Solid and hazardous waste programs fall under RCRA, one of the federal pollution control laws that does not treat tribes expressly as states. See *supra* note 156 and accompanying text.

218. 645 F.2d 701 (9th Cir.), *cert. denied sub nom.* Crow Tribe of Indians v. EPA, 454 U.S. 1081 (1981).

EPA's delegation of authority under CAA to the Northern Cheyenne Tribe.²¹⁹ The dispute in *Nance* arose prior to the 1977 amendments to CAA that expressly delegated to native governments the sole authority to redesignate reservation air quality.²²⁰ Under the original act, no statutory language permitted tribal redesignation, but EPA had promulgated regulations under which a tribe could redesignate the reservation air quality.²²¹ The Ninth Circuit, considering EPA's action against the backdrop of tribal sovereignty,²²² deferred to the agency's interpretation of the statute as reasonable.²²³

Currently, EPA is conducting a number of pilot projects that delegate to native nations the authority to implement federally mandated pollution control programs within reservation boundaries.²²⁴ Several of these projects fall under federal statutes that do not treat tribes as states. For example, the Menominee Nation is developing a hazardous waste management program for its reservation,²²⁵ the Navajo Nation is working on a tribal implementation plan for air quality,²²⁶ and the

219. This same issue specifically was reserved in *Washington DOE*, 752 F.2d at 1472:

EPA, having retained regulatory authority over Indian lands in Washington under the interpretation of RCRA that we approve today, can promote the ability of the tribes to govern themselves by allowing them to participate in hazardous waste management. To do so, it need not delegate its full authority to the tribes. We therefore need not decide, and do not decide, the extent to which program authority under Section 3006 of RCRA is delegable to Indian governments.

220. See *supra* note 154 and accompanying text.

221. *Nance*, 645 F.2d at 704 (citing 40 C.F.R. § 52.21(c) (1975)).

222. *Nance*, 645 F.2d at 713-14.

223. *Id.* at 714:

The effect of the regulations was to grant the Indian tribes the same degree of autonomy to determine the quality of their air as was granted to the states. We cannot find compelling indications that the EPA's interpretation of the Clean Air Act was wrong. Nor can we say that the Clean Air Act constitutes a clear expression of Congressional intent to subordinate the tribes to state decisionmaking.

224. See generally EPA ACTIVITIES FY 87, *supra* note 162.

225. The Menominee pilot project is discussed in REGION V CONFERENCE, *supra* note 183, at 35-45.

The particular pilot that is being developed at Menominee is one for the control of hazardous wastes. . . . The Tribe is the party with the authority, with the sovereignty, and the Tribe says this is what we want to see, these are the rules that should govern hazardous wastes. And the Tribe promulgates a tribal code which would ultimately be enforced by the Tribe and not by the State. What the State has to offer in this kind of setting is that the State has capabilities [such as laboratories and technical ability] This approach, with a division of labor, can be structured into a program which would take over from EPA what would otherwise be EPA's responsibility, in a program for the management of hazardous waste on a reservation.

Id. at 35-36.

226. U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF FEDERAL ACTIVITIES, EPA ACTIVITIES ON INDIAN RESERVATIONS: FY 86 4 (1987) [hereinafter EPA ACTIVITIES FY 86] ("The Navajo Nation Air Quality pilot project in Region IX is working on the development of an

Fort Berthold Tribes have entered into a cooperative agreement for enforcing pesticides use,²²⁷ even though none of the federal statutes involved—RCRA, CAA, or FIFRA—expressly treats tribes as states for purposes of these programs.²²⁸

If program delegations such as these are challenged in court,²²⁹ they should be affirmed under the reasoning of *Nance* and *Washington DOE* as reasonable exercises of agency authority. Nothing in these federal statutes grants to the states any authority over reservation lands or activities, and nothing expressly prohibits native nations from assuming program responsibility. Presidential policy charges the executive branch to deal with native nations on a government-to-government basis, and promotes tribal responsibility for and control over

approvable Tribal Implementation Plan (TIP) which will include visibility standards.”); *see also id.* at 9 (air quality monitoring project on the White Earth Reservation); REGION V CONFERENCE, *supra* note 183, at 32–33; Cooperative Agreement Regarding Implementation of the Northern Cheyenne Air Quality Program (State of Montana agrees to provide technical assistance for tribal development and implementation of a reservation air quality program) (copy on file with *Washington Law Review*) [hereinafter Cooperative Agreement].

227. EPA ACTIVITIES FY 87, *supra* note 162, at 5. The Fort Berthold cooperative agreement is the first pesticides delegation to a native government. In addition, three tribes—the Cheyenne River Sioux, the Lower Brule Sioux, and the Rosebud Sioux—have submitted to EPA draft pesticides applicator certification plans under FIFRA. *Id.*

228. *See supra* notes 154 (CAA) & 155 (FIFRA) and accompanying text; *see also* 42 U.S.C. §§ 6901–6991i (1982) (RCRA).

229. The challenge does not appear likely to come from a state affected by existing pilot projects. *See, e.g.,* REGION V CONFERENCE, *supra* note 183, at 33, 35–36 (praising the states of Minnesota and Wisconsin for their willingness to work with the White Earth Band of Chippewa and the Menominee Nation, respectively, on a government-to-government basis); *see also* EPA DISCUSSION PAPER, *supra* note 178, at 27 n.6 (noting the generally cooperative attitude of Arizona, and contrasting it to the expansive jurisdictional claims of the State of Washington).

Notwithstanding its collaboration, Arizona purports to take jurisdiction pursuant to Public Law 280, discussed *supra* section I.C.3, “with respect to criminal offenses and civil causes of action arising from the enforcement of laws relating to air pollution control on all Indian tribal lands, reservations and allotments.” ARIZ. REV. STAT. ANN. § 49-561 (1987). The EPA has called Arizona’s attempted assumption of jurisdiction “illegal.”

Arizona has no legal power to enforce her [sic] pollution control laws on Indians in Indian country nor has she [sic] the power to try Indians for causes of actions arising from pollution in Indian country. Apparently, until rebuked by the U.S. Supreme Court, Arizona will continue to claim jurisdiction to which she [sic] is not entitled.

U.S. ENVIRONMENTAL PROTECTION AGENCY (REGION IX), APPLICABILITY OF STATE POLLUTION CONTROL LAW TO INDIAN RESERVATIONS 1, *quoted in* Smith & Guenther, *Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds*, 9 AM. INDIAN L. REV. 83, 99–100 (1981). Aside from the illegality of Arizona’s purported assumption of jurisdiction, the authority arrogated to the state by its statute should not survive the prohibitory versus regulatory test approved by the Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210 (1987). *See supra* notes 108–10 and accompanying text. Since air pollution control manifestly is regulatory rather than criminal in nature, Arizona would not be entitled to enforce the criminal or civil court provisions of its air pollution laws even if the state had Public Law 280 jurisdiction.

reservation resources.²³⁰ The concept of inherent tribal sovereignty demands recognition of native dominion over the residents and the territory of the reservation.²³¹ In particular, the sovereign interests of the native nations have been recognized judicially in situations where, as is true with pollution control programs, the health and welfare of the tribe may be affected.²³²

Against this “backdrop” of tribal sovereign interests, EPA has interpreted the statutes it administers in light of the President’s government-to-government policy, and has concluded that the federal laws permit delegation of environmental programs to native governments. Under traditional principles of judicial deference to agency interpretation, and existing precedent, EPA’s view of its statutory authority to delegate to native tribes is reasonable.

Program delegation to tribal governments necessarily preempts state authority over the same program,²³³ much as statutory treatment of tribes as states prohibits state jurisdiction under those acts.²³⁴ The

230. See *supra* note 183 and accompanying text.

231. See *supra* notes 41–42.

232. See discussion *supra* notes 60–64 and accompanying text.

233. Such delegations only prohibit unilateral assertions of state authority; they do not prevent cooperative tribal-state agreements concerning implementation of pollution control programs in Indian country. In some instances, in fact, state-tribal agreements specifically are authorized by federal law. See, e.g., Clean Water Act, 33 U.S.C.A. § 1377(d) (West Supp. 1988) (tribes and states may enter into agreements “subject to the review and approval of the Administrator, to jointly plan and administer the requirements of this Act”).

Cooperative agreements, whether bilateral or trilateral, abound. For example, the Turtle Mountain Band of Chippewa and EPA have concluded a Memorandum of Understanding to develop “a model environmental planning system for the Turtle Mountain Reservation.” Memorandum of Understanding between Turtle Mountain Band of the Chippewa Indians, U.S. EPA Region VIII, and U.S. EPA Regulatory Integration Division (copy on file with *Washington Law Review*). On a somewhat smaller scale, EPA’s hazardous waste pilot project on the Menominee Reservation involves a cooperative agreement between the Menominee Nation and the State of Wisconsin. REGION V CONFERENCE, *supra* note 183, at 35–45. In the area of air quality, the White Earth Band of Chippewa and the State of Minnesota cooperate in an air quality monitoring program on the reservation, funded through an EPA grant. *Id.* at 32–33. The State of Montana and the Northern Cheyenne Tribe in 1984 concluded their Cooperative Agreement Regarding Implementation of the Northern Cheyenne Air Quality Program. Cooperative Agreement, *supra* note 226. As a general rule, the state role in these agreements is one of providing technical assistance and skills, with the tribes retaining sovereign authority over development, implementation, and enforcement.

The use of cooperative agreements—as well as other similar measures such as circuit riders (technical staff who “ride circuit” among a number of reservations)—consistently has been encouraged by EPA. See EPA DISCUSSION PAPER, *supra* note 178, at 29–30, 33–34, 38–39; EPA INDIAN POLICY, *supra* note 182, at 3; EPA INTERIM STRATEGY, *supra* note 182, at 10. Native nations appear willing to accept state assistance in technical areas where the states, in turn, are willing to recognize and accept tribal sovereign authority over the reservation environment. See REGION V CONFERENCE, *supra* note 183, at 35.

234. See *supra* notes 162–64 and accompanying text.

EPA has rejected any notion of concurrent tribal-state regulatory authority or checkerboard jurisdiction within reservation borders as inconsistent with existing case law and unworkable from a practical standpoint.²³⁵ Thus, to the extent EPA delegates to tribes the authority to implement federal pollution control programs in Indian country, state jurisdiction to extend the "in lieu of" programs over the same territory is barred.

Moreover, deference to EPA's two-pronged interpretation of federal environmental statutes should serve to prohibit the application in Indian country of those more stringent state laws permitted under the federal schemes.²³⁶ The federal pollution control acts generally permit only those more stringent state laws that are not inconsistent with the federal statutes.²³⁷ But state assertion of regulatory authority in Indian country in the areas governed by the federal statutes *is* inconsistent with those laws. Under EPA's interpretation, to the extent that tribes are not treated as states, the federal statutory and regulatory schemes provide for federal primacy in native territory with program delegation to the tribal governments. Concurrent but more stringent state regulation in the same territory, therefore, by definition would be

235. EPA DISCUSSION PAPER, *supra* note 178, at 90-91:

[D]ual and possibly inconsistent environmental regulation is not a compatible area for concurrent jurisdiction. . . .

[T]he present weight of existing authority in Indian jurisdiction law supports tribal regulatory authority over pollution sources within the borders of the reservation. . . .

[A]rguments for concurrent or checkerboard state authority within reservation boundaries will probably fail in the courts. . . . Finally, residual arguments for checkerboard jurisdiction or for state jurisdiction over non-Indians must be weighed by EPA in terms of the practical difficulties of regulating the environment with two different sets of rules based on racial lines—Indians and non-Indians.

See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338-39 (1983) (rejecting concurrent tribal-state regulation of non-Indian hunting and fishing on tribal land because concurrent jurisdiction "would effectively nullify the Tribe's authority" and "would completely 'disturb and disarrange' " the federal interests).

236. See also *supra* note 157 and accompanying text (addressing more stringent state laws under the federal acts that treat tribes as states).

237. One commenter argues that more stringent state laws under RCRA are exercises of valid state police power, completely apart from and not prohibited by the federal pollution control acts, and thus their applicability to native territory is determined by the judicial "infringement/preemption" analysis, discussed *supra* section I.C.1. Allen, *supra* note 3, at 84-87. As noted in the text, however, more stringent state laws are not separate from, but rather expressly are permitted by, the federal statutory schemes. See *supra* note 157 and accompanying text. The applicability of state environmental laws under the infringement/preemption test is discussed *infra* at Section III.C.

inconsistent with the federal-tribal scheme established by the pollution control laws.²³⁸

Judicial deference to these agency interpretations, and judicial affirmance of the reasonableness of the agency's views, should serve to proscribe state pollution control authority on native lands under most circumstances where the state is not barred already by statutory provisions. Nonetheless, there may be instances where neither statutory tribes-as-states language nor deference to agency statutory interpretation is applicable to a particular state assertion of environmental authority. In such instances, whether the state can impose its regulations in Indian country is determined by the "infringement/preemption" test applicable generally to assertions of state regulatory authority over native lands.

C. *The Infringement/Preemption Test*

As a general rule, whether and when a state can regulate on the reservation is a function of the judicially contrived infringement/preemption analysis.²³⁹ The applicability of this analysis to state assertions of regulatory authority in the environmental arena, however, is largely mooted by the language of the federal pollution control statutes and EPA's interpretation of its statutory mandate. In virtually every instance, state attempts to regulate in Indian country, under either state "in lieu of" programs or more stringent state laws permissible under the federal statutes are barred by one of the two doctrines discussed above.

Nonetheless, the infringement/preemption test of domestic Indian law is too pervasive in determining state regulatory authority for courts or commenters to abandon it altogether in the environmental context.²⁴⁰ While even commenters adverse to tribal interests agree that state regulatory schemes enacted pursuant to the federal laws are

238. Further, a state regulatory program more restrictive than the tribal scheme for the same reservation effectively would supplant tribal pollution control regulation, infringing upon the tribal government's inherent right to control its own territory. See *infra* Section III.C.2.

239. The parameters of the test are described *supra* at Section I.C.1.

There are, of course, prohibitions on state regulation that arise from analyses other than the infringement/preemption test. Two of those are described in the preceding sections: direct federal preemption of state authority, and "preemption" via judicial deference to agency interpretation of statutes. Since these two situations rarely arise outside the environmental arena, however, most modern state assertions of regulatory authority in Indian country have been adjudged under the two-pronged infringement/preemption test.

240. But see Du Bey, Tano & Parker, *supra* note 3, at 468-69 (arguing that the balance of interests is not appropriate to a RCRA analysis because of the need for a single management scheme, EPA's interpretation of RCRA, and the federal Indian policy preempting state hazardous waste jurisdiction).

preempted under the doctrines discussed above,²⁴¹ there is disagreement whether the infringement/preemption test is applicable to more stringent state laws provided for in the federal acts,²⁴² or to state regulation of non-native persons and activities within native territory.²⁴³

Given the Supreme Court's penchant for using the infringement/preemption analysis,²⁴⁴ however, that test likely will be employed by the courts to determine the applicability of any supplemental or additional state pollution control laws enacted under the state police power. Courts already have employed a part of that test—the “backdrop” of tribal sovereignty that informs the domestic Indian law preemption analysis—to inform and bolster their administrative law decisions upholding EPA's interpretation of the federal pollution control laws.²⁴⁵ Thus, despite its limited applicability in the environmental context, courts likely will continue to use the infringement/preemption analysis for determining at least certain aspects of state pollution control authority in Indian country.

1. *Federal Indian Law Preemption*

a. *Backdrop of Tribal Sovereignty*

The first component of the domestic Indian law preemption analysis is the “backdrop” of tribal sovereignty against which the interests of the various governments are weighed. In its most current articulation

241. Allen, *supra* note 3, at 84–85.

242. See *supra* note 237. As discussed *supra* Sections III.A and III.B, statutory treatment of tribes as states, other express preemptive language in the federal statutes, and EPA's policy of federal primacy with program delegation to native governments, all serve to preempt or prohibit state implementation of more stringent laws under theories other than the Indian law infringement/preemption analysis.

243. Two of the commenters who thus far specifically have addressed the issue of state regulation of non-native pollution both assume that the infringement/preemption test is the appropriate analysis, although they disagree about the outcome of applying that analysis. See Allen, *supra* note 3, at 87–114 (arguing that states are empowered to regulate in Indian country at least as to non-natives); *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1110–11 (positing that tribes are the proper regulating authority over natives and non-natives alike inside reservation borders).

Both commenters appear to ignore the fact that EPA has asserted federal primacy “on Indian lands,” which includes non-Indian fee lands within reservation borders. See *supra* notes 206–07 and accompanying text. For the most part, then, state assertions of regulatory authority over non-natives in Indian country will be barred by judicial deference to agency statutory interpretation, as exemplified in *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (discussed *supra* notes 191–200 and accompanying text).

244. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215–21 (1987); see also *supra* notes 76–88 and accompanying text (discussion of *Cabazon*).

245. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469–72 (9th Cir. 1985); *Nance v. EPA*, 645 F.2d 701, 713–14 (9th Cir.), *cert. denied sub nom. Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981).

of the preemption test, the Supreme Court stated that this backdrop encompasses "traditional notions" of native sovereignty,²⁴⁶ and indicated as well that the backdrop should include federal promotion and encouragement of native self-government, self-sufficiency, and economic development.²⁴⁷

The fundamental "traditional notions" of tribal sovereignty relevant to the pollution control area are dominion over the territory of the reservation,²⁴⁸ sovereignty over citizens of the native nation,²⁴⁹ the right to make and enforce laws and set domestic policy,²⁵⁰ and control of tribal natural resources, including the reservation environment.²⁵¹ Additional sovereign powers vital to control of pollution include the protection and maintenance of citizen health and welfare,²⁵² and con-

246. *Cabazon*, 480 U.S. at 216. The Court properly refocused the backdrop inquiry on broad-based concepts of tribal sovereignty, rather than the limited, particularized notion of sovereign interests articulated in *Rice v. Rehner*, 463 U.S. 713, 722 (1983). See discussion *supra* note 78 and accompanying text.

247. *Cabazon*, 480 U.S. at 216 ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."); see *supra* note 78 (discussing the expansion of the backdrop component inherent in this formulation).

248. See *supra* notes 41 & 45 and accompanying text.

249. See *supra* notes 41-44 and accompanying text.

250. See *supra* note 42 and accompanying text.

251. Most treaties, statutes, or executive orders reserving or establishing native reservations are silent or, at best, ambiguous as to retained tribal property interests beyond surface use. Rather than draw the inference that no resources were included in the reservation, however, courts overwhelmingly have construed these documents as reserving to the tribe all beneficial interests in the reservation. *United States v. Shoshone Tribe*, 304 U.S. 111, 113 (1938) (mineral and timber rights impliedly reserved when treaty "set apart [lands] for the absolute and undisturbed use and occupation of the Shoshone"); *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123 (1938) (tribes' rights in land extend to all elements that make land valuable). Subsequent cases have enumerated these beneficial interests to include all wildlife, timber, minerals, and fugacious minerals (oil and gas) on tribal lands. As the Supreme Court noted in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983):

It is beyond doubt that the Mescalero Apache Tribe lawfully exercises substantial control over the lands and resources of its reservation, including its wildlife. . . . [T]he sovereignty retained by the Tribe under the Treaty of 1852 includes its right to regulate the use of its resources by members as well as non-members. In *Montana v. United States* [450 U.S. 544 (1981)], we specifically recognized that tribes in general retain this authority.

252. See *Montana v. United States*, 450 U.S. 544, 566 (1981) (acknowledging inherent sovereign powers of native governments over conduct affecting "the health or welfare of the tribe"); *Cardin v. De La Cruz*, 671 F.2d 363, 364, 366 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982) (holding that "dangerous and unsanitary conditions" of non-native business on fee land were within tribe's power to regulate, in part because of effect on tribal health and welfare); *Colville Confederated Tribes v. Cavenham Forest Indus.*, 14 Ind. L. Rep. 6043 (Coly. Tr. Ct. 1987) (enjoining non-native corporation on fee land from using part of its property as a dump site for waste from wood products, in part because of impact on tribal health and welfare, unless corporation complies with tribal land use procedures); see also *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1111; Comment, *The Developing Test for State Regulatory*

trol over land use and economic development patterns.²⁵³ To the extent that the backdrop of native sovereignty still includes a "tradition of self-government" in the particular field under consideration,²⁵⁴ the existence of tribal environmental agencies and programs, pollution control laws, cooperative agreements, and other trappings of native legislative sovereignty may be important in any particular factual situation. Although such a particularized inquiry into the manifestations of a tribe's sovereign powers ostensibly has been disavowed,²⁵⁵ the existence of particular indicia of tribal pollution control authority can

Jurisdiction in Indian Country: Application in the Context of Environmental Law, 61 OR. L. REV. 561, 581 (1982) [hereinafter *The Developing Test*].

253. See, e.g., *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) ("It is beyond question that land use regulation is within the Tribe's legitimate sovereign authority over its lands."); *Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951, 964 (9th Cir. 1981) (affirming inherent tribal powers to regulate non-native riparian rights to build and maintain docks, breakwater, and storage shed on tribally-owned lake), *cert. denied*, 459 U.S. 977 (1982); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1110 (9th Cir. 1981) (noting "the ability of a tribe to exercise traditional governmental functions such as zoning"), *cert. denied*, 459 U.S. 916 (1982); see also *supra* note 64 and accompanying text (zoning cases discussed).

254. The penultimate Supreme Court formulation of the test for state regulatory jurisdiction in Indian country determined the backdrop of tribal sovereignty by seeking a tribal tradition of self-governing activity in the particular area in question. *Rice v. Rehner*, 463 U.S. 713, 722 (1983). Although the Court more recently appears to have retreated to its earlier stance that general rather than specific traditions of sovereignty should comprise the analytical backdrop, see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-18 (1987), the Supreme Court is not known for consistency in its Indian law opinions. Thus, the future importance of particularized traditions of self-government remains speculative. See generally *supra* note 78 (discussion of this aspect of *Rice* and *Cabazon*).

255. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987) (the preemption analysis "is to proceed in light of traditional notions of Indian sovereignty"); see also *id.* at 220 (distinguishing *Rice*); *id.* at 226 (Stevens J., dissenting) (arguing for state authority because the tribe "has no tradition or special expertise in the operation of large bingo parlors").

The absurdity and irony of requiring, as *Rice* did, a tribal tradition of sovereignty in a particularized area are especially evident in the pollution control arena. Few tribes have implemented environmental statutes and programs. U.S. ENVIRONMENTAL PROTECTION AGENCY, SURVEY OF AMERICAN INDIAN ENVIRONMENTAL PROTECTION NEEDS ON RESERVATION LANDS: 1986, 5 (1986) ("Twenty-eight tribes are currently implementing their own environmental protection programs."). Moreover, since many polluting activities are "relatively recent phenomenon[a], there is, of course, no history or tribal tradition of sovereignty in this area." *Id.* at 106 (quoting the Amicus Brief of the State of California in *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985)). Because pollution control is a relatively recent activity, and because many reservations are located far from major population centers and have relatively pristine environments, it is logical that few native nations have developed elaborate laws and programs to address the issue. Under the *Rice* analysis, however, the very fact that much of Indian country historically has been pollution-free, and thus that many tribes have no pollution control mechanisms in place, would be a reason to permit state encroachment. Those tribes with cleaner environments thus could be penalized for that fact.

serve only to strengthen the judiciary's perception of the backdrop of tribal sovereignty.²⁵⁶

Federal policy promoting native self-determination is the second component of the backdrop of tribal sovereignty.²⁵⁷ In the area of environmental protection, this federal policy is particularly forceful. The "congressional goal of Indian self-government"²⁵⁸ is manifested generally in enactments furthering native self-determination and economic development,²⁵⁹ and specifically in legislation promoting tribal primacy in pollution control activities.²⁶⁰ Executive branch policy echoes the congressional. Former President Reagan's Indian policy

256. Courts at times purport to find no necessity for a native nation to have acted in order to preserve tribal sovereign powers. *See, e.g.,* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("[t]o presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power . . . turns the concept of sovereignty on its head"); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1393 (9th Cir. 1987) ("failure of the Tribe to legislate does not constitute a relinquishment of its authority to do so"). *But compare* *State v. Webster*, 114 Wis. 2d 418, 338 N.W.2d 474 (1983) (no state traffic jurisdiction over natives on Menominee Reservation, in part because Menominee Nation had traffic code, police department, court system, and jail) *with* *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985) (state had at least interim traffic jurisdiction over natives on Lac du Flambeau Reservation because tribe had no motor vehicle code and no tribal court).

One consequence of this judicial inconsistency is that native governments cannot rely upon the judiciary to uphold tribal sovereign power if that power is not evidenced in legal codifications, court systems, or other manifestations familiar to domestic courts. Native nations essentially are forced to practice "legal auto-genocide." Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. REV. 219, 274. Only by subordinating their sovereignty through the adoption of the laws and legal mechanisms of the majority culture can native nations assure that the domestic court system will consider tribal "sovereign" interests.

257. *See supra* note 76 and accompanying text.

258. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

259. *See, e.g.,* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(b) (1982) ("Congress declares its commitment to . . . the establishment of a meaningful Indian self-determination policy"); Indian Financing Act of 1974, *id.* § 1451 (congressional policy is to provide capital "to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources"); Indian Tribal Governmental Tax Status Act, 26 U.S.C. § 7871 (1982) (treating tribes as state equivalents for purposes of certain tax exemptions).

260. The federal pollution control laws that treat tribes as states, *see supra* Section III.A, manifest a clear congressional intent that native governments exercise self-governing powers with respect to environmental protection. Beyond the "tribes as states" statutory language, the legislative intent for tribal autonomy in reservation environmental matters is manifested also in the *Congressional Record*. For example, in debates on the House floor concerning the 1977 Clean Air Act Amendments, the manager of the House bill noted:

The concept of Indian sovereignty over reservations is a critical one, not only to native Americans, but to the Government of the United States. A fundamental incident of that sovereignty is control over the uses of their resources. Some statutes, I imagine, have encroached upon Indian sovereignty, eroding treaty rights negotiated at an earlier time.

This is not such a bill.

123 CONG. REC. H8665 (1977) (statement of Rep. Rogers (Fla.)).

stated his administration's position of dealing with native nations on a government-to-government basis, pursuing a policy of self-determination, and increasing tribal primary responsibility for such areas as developing and managing reservation resources.²⁶¹ In line with this presidential policy, EPA has adopted its own, more specific policy of government-to-government relationships with the native nations,²⁶² including the express recognition that filtering tribal pollution control programs through the states is contrary to the spirit and function of intergovernmental federal-tribal relations.²⁶³ In consequence, EPA's policy dictates federal primacy and program delegation to tribal governments in those instances where the federal statutes do not expressly authorize the treatment of tribes as states.²⁶⁴

The backdrop of tribal sovereignty and the federal policy advancing native self-government, both generally and more particularly in the pollution control area, thus strongly support tribal primacy over environmental protection matters in Indian country. Against this backdrop, the courts engage in the second stage of the Indian law preemption analysis: balancing the interests of the three governments involved. As a rule, given the overriding federal policy of promoting native self-government, the federal and tribal interests are weighed on the one hand against the state interests on the other.²⁶⁵

261. 19 WEEKLY COMP. PRES. DOCS. 98, 99 (Jan. 24, 1983). While Reagan's policy was the first specifically to recognize the governmental status of tribes, presidential policy promoting native self-determination began with President Johnson's administration. Johnson called for an end to the "old debate about 'termination'" and a new "policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, and self-determination." *"The Forgotten American": The President's Message to the Congress on Goals and Programs for the American Indians*, PUB. PAPERS 335 (1968-69). Nonetheless, the shift in presidential policy to full promotion of native "self-determination" generally is credited to President Nixon. *Special Message to the Congress on Indian Affairs*, PUB. PAPERS 564 (1970). See generally J.D. FORBES, *NATIVE AMERICANS AND NIXON: PRESIDENTIAL POLITICS AND MINORITY SELF-DETERMINATION*, 1969-72 (1981) (critiquing the Nixon policy formulation and its rhetoric of self-determination); Israel, *supra* note 37, at 629-30 (discussing the impact of the Nixon policy).

President Bush has released no formal Indian policy. A presidential staff release states that the new chief executive "believes in American Indian self-government" and will emphasize the "individual rights and economic well-being of Native Americans on or off the reservation." *Bush Plans New Indian Policy*, San Francisco Chron., Jan. 31, 1989, at 12. A Bush administration emphasis on individual native rights and freedoms, especially those vis-a-vis tribal governments, coupled with continued severe budget proposals for native programs, unquestionably will undermine any rhetorical reaffirmation of support for tribal self-government.

262. EPA INDIAN POLICY, *supra* note 182.

263. *Id.* at 2; EPA INTERIM STRATEGY, *supra* note 182, at 11.

264. See *supra* Section III.B.

265. Recently, this analytical balancing has come under attack from western state attorneys general, led by Ken Eikenberry of Washington State. At its 1987 conference, the Conference of Western Attorneys General approved Resolution No. 87-10, proposed by Washington, that calls

b. The Balance of Federal, Tribal, and State Interests

Federal interests in the area of pollution control in Indian country include those federal policies described above: the general policy of promoting tribal sovereignty and self-sufficiency and the more specific policies encouraging tribal control over reservation resources and tribal primacy over environmental protection activities.²⁶⁶ In addition, the federal government has a general interest in implementing and enforcing pollution control programs, and a more particular interest in assuring that at least the federal minimum standards are met on native lands.²⁶⁷ Federal responsibilities toward native peoples imposed by the trust relationship create additional federal interests in serving as a buffer between native governments and the states,²⁶⁸ and in ensuring that native lands do not become dumping grounds for state pollution

on the federal Department of Justice "to review its litigation policies involving federally-recognized Indian tribes and to insure that all competing federal interests, especially those which are consistent with the interests of the several states and their non-Indian citizens, are properly and fairly considered and represented." See also Letter from Ken Eikenberry, Attorney General of Washington, to Edwin Meese, United States Attorney General, at 5 (Dec. 9, 1987) [hereinafter Eikenberry Letter].

266. One commenter posits that the federal government has no particular interests in the area of hazardous waste regulation on native lands, and that the general federal interest in tribal self-government—the only federal interest recognized by the commenter—is insufficient to overcome state interests. Allen, *supra* note 3, at 107–09. There are significant problems with this assertion. First, Allen's analysis is focused narrowly on hazardous waste regulation in particular, and not pollution control regulation in general. Second, Allen ignores all federal interests other than the general federal policy of promoting tribal sovereignty. See *infra* notes 267–70 and accompanying text. And finally, in that section of her analysis, Allen neglects not only other federal interests, but all tribal interests as well. See *infra* notes 271–79 and accompanying text.

267. Allen argues that this federal interest is weak because of EPA's poor track record of environmental regulation on native lands. Allen, *supra* note 3, at 74, 111. Indications are, however, that EPA is increasing enforcement of environmental protection programs on native lands through a variety of mechanisms, including direct federal enforcement, cooperative agreements between tribes and states, and pilot projects on selected reservations. See *supra* notes 224–27 & 233 and accompanying text.

268. Protecting native governments against encroachments by the states was a primary rationale for the development of the trust doctrine. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383–384 (1886):

These Indian Tribes are the wards of the Nation They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

(emphasis in original). For a brief discussion of the trust doctrine, see *supra* note 21. The importance of this aspect of the federal responsibility is manifest particularly in the protection of native treaty fishing rights. See, e.g., *supra* note 187 (federal court's admonition of Washington State's entrenched obstructionist posture in the Pacific Northwest treaty rights cases).

problems.²⁶⁹ Additional federal interests, identified by EPA, include avoiding dual regulatory schemes for pollution control and avoiding checkerboard jurisdiction over reservation lands.²⁷⁰

The interests of native governments in the pollution control field include the general sovereign interests, discussed above, of self-government and territorial integrity. Of particular importance are the right to control the level of allowable pollution on native lands,²⁷¹ the right to exercise control over the pace and the degree of development of the reservation and the reservation resource base,²⁷² the right to control land use within native territory,²⁷³ and the right to control issues of

269. Federal responsibilities specifically with regard to native lands and environments frequently have been noted. See *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1110; Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. ENV'T'L L. & POL'Y 145, 161 (1982). The federal trust responsibility for native land bases manifestly would be implicated by state use of Indian country as a repository for pollutants and polluting activities not wanted elsewhere in the state. Cf. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985) ("the United States in its role as primary guarantor of Indian interests legitimately may decide that such tribal concerns [as becoming a dumping ground] can best be addressed by maintaining federal control over Indian lands").

270. See *supra* notes 212 & 235 and accompanying text.

271. "Since the land base of most tribes is severely limited, environmental externalities [i.e., environmental damage as a cost external to industrial development] may pose an unusually serious threat." Barsh & Henderson, *Tribal Administration of Natural Resource Development*, 52 NORTH DAKOTA L. REV. 307, 333 (1975); see, e.g., *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042 (N.D. Cal. 1988) (preliminarily enjoining operation of non-native asphalt and cement plants on non-native land within reservation, because "operation of the plants threatens injury to the land, water, and air, as well as the health and welfare of the Indians").

272. The economic development authority of native governments is widely recognized. See, e.g., *Indian Financing Act*, 25 U.S.C. § 1451 (1982); *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982) (noting "the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development"); *Governing Council of Pinoleville Indian Community v. Mendocino County*, 684 F. Supp. 1042, 1045 (N.D. Cal. 1988) (noting tribe's "substantial interests in controlling industrial development"); *The Developing Test*, *supra* note 252, at 581. So also is tribal authority over reservation resources. See *supra* note 251. As one commenter notes, native title to native lands includes title to the resources, and therefore tribal actions with regard to resources are taken in both a proprietary and a governmental capacity. "Thus, where tribal resources are involved, tribal authority should be regarded as plenary, subject only to specific federal prohibition." Israel, *supra* note 37, at 634; see also Barsh & Henderson, *supra* note 271, at 333 (positing tribal control of reservation resources as the optimum means of minimizing environmental damage from resource development); Du Bey, Tano & Parker, *supra* note 3, at 471 (advocating tribal environmental protection programs as a way to encourage economic development consistent with tribal environmental goals).

273. Domestic courts repeatedly have acknowledged tribal control over zoning and land use planning within reservation borders. See *supra* notes 64 & 253 and accompanying text. And, as one commenter notes, "[e]nvironmental regulation is certainly very akin to land use regulation." Will, *supra* note 3, at 491. Since environmental protection is so closely tied to land use, the cases

health and welfare affecting the reservation population.²⁷⁴ Additional native governmental interests include the capacity to comprehend and respond to tribal needs and priorities,²⁷⁵ to safeguard tribal environmental programs against spillovers from polluting activities located outside tribal jurisdiction,²⁷⁶ and to prevent native lands from becom-

upholding tribal governmental powers over land use decisions reinforce the arguments in favor of tribal authority over pollution control in Indian country.

Even Allen admits that tribal rights to zone and control land use “demonstrate the tribal interest in protecting the reservation environment.” Allen, *supra* note 3, at 103. She goes on, however, to assert that hazardous waste regulation is distinguishable because RCRA provides little or no role for tribes in hazardous waste management. *Id.* This argument is specious. First, a lack of express delegation to tribes in the federal statute does not impinge upon the inherent sovereign right of native nations to control land use within tribal territory. Second, hazardous waste regulation seems peculiarly tied to the land. Finally, tribes increasingly are assuming hazardous waste regulatory authority in Indian country. See *supra* note 225.

274. See *supra* note 252 and accompanying text.

275. As one commenter notes in the context of state governments:

The protection of public health, safety, and welfare is a traditional function of state and local governments; state governments are closer to the problem and often have greater knowledge of local environmental, economic, and political conditions.

....

It has also been suggested that state agencies may be more responsive to citizens, act faster, and be more flexible, pragmatic, and creative in their solution of hazardous waste problems than EPA.

Allen, *supra* note 3, at 112 & n.253. These factors, which Allen cites as supporting *state* jurisdiction in Indian country, carry much more weight as reasons why *tribal* jurisdiction should be paramount. Health and welfare is a traditional tribal governmental function; tribal governments clearly are closer to the problems in Indian country and more aware of local needs and conditions. Tribal governments unquestionably are likely to be more responsive to their citizens than are state or adjacent municipal entities.

276. “Spillovers spill over both ways.” Barsh, *supra* note 74, at 875. This obvious truth, so aptly stated, apparently needs to be reiterated at every turn. In virtually every instance where state interests are discussed, spillover—the effect in one jurisdiction of actions taken in another—is listed as a legitimate state concern. See, e.g., *Rice v. Rehner*, 463 U.S. 713, 724 (1983) (upholding state licensure requirement for on-reservation general store where “distribution of liquor [for off-premises consumption] has a significant impact beyond the limits of the . . . Reservation”); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983) (“A State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.”); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (“principles of federal Indian law . . . [do not] authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business [off-reservation]”). And yet virtually never is spillover listed as a valid tribal concern. See Kramer, *supra* note 22, at 1032 (noting the Supreme Court’s failure to balance tribal interests in spillover situations). It is too obvious to merit discussion, however, that pollutants which can travel off a reservation can as easily migrate onto a reservation.

The issue of spillovers would become especially important in the unlikely event that a court would permit checkerboard pollution control authority in Indian country, with EPA and/or the tribe regulating native sources and the state regulating non-native sources. See *supra* notes 212 & 235. The irony in that case, of course, is that a native nation would have essentially no protection against spillovers occurring within its own territory, but outside its jurisdiction.

ing dumping grounds for pollutants generated off-reservation.²⁷⁷ Tribes also legitimately fear a lack of state enforcement on native lands²⁷⁸ and mistrust state sensitivity to tribal needs.²⁷⁹

State interests in pollution control regulation within native territory include the desirability of uniform laws and uniform enforcement of pollution control programs within state borders,²⁸⁰ the potential for frustration of state environmental programs through spillovers from on-reservation pollution sources,²⁸¹ the perceived lack of enforcement

277. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1470 (9th Cir. 1985); EPA DISCUSSION PAPER, *supra* note 178, at 83; *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1111. Included in this concern is the related fear of "midnight dumping" on reservation lands. See REGION V CONFERENCE, *supra* note 183, at 20.

278. One commenter argues that "[i]f a state is aggressive enough to seek control over hazardous waste on Native American lands, it is likely to be particularly conscientious in regulating these wastes." Allen, *supra* note 3, at 112 n.251.

279. The same commenter posits that states have an interest in considering tribal sovereignty because "[s]tate encouragement of tribal participation and explicit acknowledgement of tribal concerns would undoubtedly further Washington's regulatory efforts on the reservations." Allen, *supra* note 3, at 106. The naiveté of this statement is startling, particularly since it was made about the State of Washington, which has been reprimanded by the federal courts for its recalcitrance in dealing with native governments. See *supra* note 187.

280. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465, 1472 (9th Cir. 1985) ("We recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands."). See also Allen, *supra* note 3, at 97-99; *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1111.

Allen argues also that states have an interest in avoiding federal-state checkerboard jurisdiction within the borders of the state. Allen, *supra* note 3, at 99-100. And yet Allen essentially recognizes native authority over native activity, and proposes state jurisdiction only over non-native activity in Indian country. *Id.* at 115. Thus, even under Allen's proposal, there would be a patchwork of state and tribal authority on native lands. Furthermore, where the federal or tribal government exercises pollution control authority over the entirety of native territory, the boundaries between governmental jurisdictions are well marked: the state has jurisdiction outside Indian country, and the federal or tribal government has jurisdiction within that country. Such a straightforward demarcation of jurisdictional lines is not confusing. Under Allen's formulation, by contrast, which government was entitled to regulate a particular parcel of land, or the activity occurring on that land, would be fact specific and difficult to determine. The uniformity and certainty that Allen advocates would be sacrificed by the author's own proposed solution.

281. Allen, *supra* note 3, at 98-99; *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1111; *The Developing Test*, *supra* note 252, at 582.

The specter of spillover effects is the interest most often asserted by states. See *supra* note 276. The attorney general of Alaska, for example, asserted that although in general state jurisdiction over air pollution sources on the Metlakatla Reservation is not "legally certain," the state would have such authority where on-reservation air pollution had off-reservation impacts. 1983 Op. Att'y Gen. Alaska No. 101; see also 1965 Rep. Att'y Gen. N.M. 44 (positing state air pollution jurisdiction over non-native lessees, in part because the effect of the pollution occurs outside the reservation). As the Ninth Circuit noted in *Washington DOE*, however, "EPA remains responsible for ensuring that the federal standards are met on the reservation. Those standards are designed to protect human health and the environment. The state and its citizens will not be without protection." 752 F.2d at 1472 (citation omitted).

of federal programs on native lands,²⁸² the lack of tribal expertise and technical competence in managing environmental programs,²⁸³ and the potential for a competitive tribal economic advantage because of lesser environmental controls on industry.²⁸⁴ In addition, states assert a greater interest over non-native persons, activities, and lands simply because of their non-native status.²⁸⁵

The courts must balance these sovereign interests of the three governments in light of the backdrop of tribal sovereignty and the federal policies of promoting tribal self-sufficiency and self-government. Native sovereignty extends over Indian country, including the natural resources and environment and any development activities, and over

282. Allen, *supra* note 3, at 74:

In general, EPA does not have an outstanding record in regulating environmental problems on [native] lands. Historically, EPA has hesitated to impose economically burdensome environmental regulations on Native American tribes. In addition, it has not taken a strong enforcement role on Native American lands until a serious problem has arisen.

(footnotes omitted). The problem is exacerbated where the state standards are more stringent than the federal minimums. *Id.* at 74, 97–98. To some degree, enforcement problems now are being addressed through tribal assumption of environmental program responsibility and through cooperative agreements among EPA, the native nations, and the states. *See supra* notes 224–27 & 233 and accompanying text.

283. *See* REGION V CONFERENCE, *supra* note 183, at 8, 14. A variety of solutions to the problem has been proposed by tribal leaders and EPA administrators, including increased funding by EPA for training, staff, and technology, the circuit-rider approach, regional tribal organizations, and cooperative agreements with neighboring states and with the federal agency. *Id.* at 8, 72.

284. Allen, *supra* note 3, at 73; *The Developing Test*, *supra* note 252, at 582; *see also* Eikenberry Letter, *supra* note 265, at 2–3 (asserting that tribes and businesses both seek to have industry locate in Indian country to avoid state regulation, particularly state environmental regulation). *But see id.* at 4 (positing that a lack of state environmental regulation is detrimental to reservation economic development because “industry ends up in an uncertain regulatory environment”).

Like the spillover issue, *see supra* note 276, inequitable competitive climates for industry is a fact faced by many adjacent jurisdictions—tribal/state, state/state, and nation/nation. For example, any time one state adopts the federal minimum pollution control requirements, a neighboring state with stricter laws can claim a competitive disadvantage in attracting and keeping industry. Like spillovers, that fact never has justified interstate regulation.

285. Allen, *supra* note 3, at 100; *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1111; *see also The Developing Test*, *supra* note 252, at 582 (“the tribal interest is the least in the situation of non-Indians on fee land”).

Several state attorneys general have posited that their states have environmental regulatory jurisdiction over non-natives or non-native fee land within Indian country. *See, e.g.*, 1965 Rep. Att’y Gen. N.M. 44 (state has jurisdiction over a non-native lessee of reservation land where lessee’s air pollution affects non-native land off the reservation); 1970 Rep. Att’y Gen. N.M. 8 (state may apply its air and water quality regulations to privately-owned industries located on-reservation); 72 Op. Att’y Gen. Wis. 54 (1983) (state may regulate mining on non-native fee land in order to protect groundwater); *see also* 1983 Op. Att’y Gen. Alaska No. 101 (suggesting that courts “might more easily find civil environmental regulatory jurisdiction over non-Indian individuals or businesses operating on Indian reservations”).

the health and welfare of residents of the tribal territory. Federal executive and congressional policies strongly encourage tribal self-determination, self-government, and self-sufficiency, both generally and specifically in the areas of environmental protection and pollution control. Together, these factors create a backdrop to the balancing test that clearly supports tribal and federal primacy in Indian country.

When viewed in light of this backdrop, the balancing test necessarily tips in favor of the tribal and allied federal interests. Many of the legitimate state interests—uniform laws, spillover concerns, and enforcement issues—are being addressed through increased attention by EPA to pollution control in Indian country, the growth of tribal programs to address specific and overall environmental concerns, and cooperative agreements between tribes and states.²⁸⁶ In any case, many of these state interests are no greater in the state-tribal context than they are with regard to neighboring states. Spillovers and problems with lack of uniform laws potentially plague any situation involving contiguous jurisdictions.²⁸⁷

Moreover, the asserted state interests become only minimally stronger where non-natives are involved. Although in certain situations domestic law accords states a greater degree of regulatory jurisdiction over non-natives than over natives,²⁸⁸ tribal regulatory

286. See *supra* notes 225–26. See generally EPA ACTIVITIES FY 87, *supra* note 162; EPA ACTIVITIES FY 86, *supra* note 226.

287. One commenter attempts to distinguish tribal-state border problems from state-state issues.

The problems between neighboring states and between states and reservations within their borders, however, are different in an important matter of degree. While there are states whose borders are blurred by urban development, for the most part the developed areas of neighboring states do not overlap. Often neighboring states are divided by geographic features, such as rivers or mountains. The problem raised by lower regulatory standards on reservations is different than the equivalent problem between sister states because of the close overlap between reservation land and non-reservation land. Thus, the degree to which a reservation will have an adverse effect on a state's regulatory program is correspondingly greater than between sister states.

Allen, *supra* note 3, at 98 n.177. Allen's distinctions are chimerical. The only "close overlap" between tribal and state lands is that they abut, as do lands of most states with lands of neighboring states. The fact that some states are separated at a border by a natural boundary hardly prevents spillover pollution problems, and in fact may aggravate them. See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (Vermont alleged water pollution by New York source of border lake between the states); *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (Illinois alleged pollution of Lake Michigan resulting from sewage dumped by Wisconsin city).

288. See, e.g., *Montana v. United States*, 450 U.S. 544 (1981) (state can regulate non-native hunting and fishing on non-native fee land in Indian country); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (state can tax non-natives purchasing cigarettes from native retailers on the reservation).

authority over non-natives nonetheless is extensive. Native governments are entitled to regulate non-natives where those non-natives enter into consensual business dealings with the tribe or its members.²⁸⁹ In addition, native governments are entitled to regulate non-natives, even on non-native fee land, when non-native conduct impacts or may impact tribal health and welfare, economic security, or political integrity.²⁹⁰ At the very least, non-native sources of pollution or potential pollution may threaten or directly affect the health and welfare of tribal members residing in or owning interests in land located within tribal territory.²⁹¹

There is little doubt, then, that native governments may regulate non-native sources of pollution anywhere within the reservation. Sources on all lands in Indian country may be regulated because of the effect on tribal health and welfare. Pollution sources on native lands also may be regulated because of tribal authority over non-natives engaged in dealings with the tribe or its members.

The remaining question is the exclusivity of tribal regulation. The Supreme Court has stated that tribal authority to regulate will preempt state jurisdiction where concurrent jurisdiction "would effectively nullify" native authority or would enable the state "wholly to supplant" the tribal regulatory scheme.²⁹² Concurrent pollution con-

289. *Montana*, 450 U.S. at 565. See discussion *supra* notes 58–59 and accompanying text. Non-native lessees of tribal lands or non-native businesses that operate on native lands are examples of non-natives who enter into consensual business dealings. Hence a pollution source resulting from such non-native activity on tribal lands will be within the exclusive regulatory jurisdiction of the tribe.

Tribal regulatory control over non-native lessees of tribal lands may be particularly important, since "[w]hen the leased land reverts to the tribe, the tribe will be saddled with the environmental effects of the lessee's activities." *The Developing Test*, *supra* note 252, at 584; see also *Non-Indian Hazardous Waste Regulation*, *supra* note 3, at 1114 n.212 (noting that state interests in regulating non-Indians who do not own land in fee are particularly weak).

290. *Montana*, 450 U.S. at 566; see discussion *supra* notes 60–64 and accompanying text. Under the *Montana* test, non-native conduct need not have a present effect on tribal interests, but only "threaten[]" such an effect. *Montana*, 450 U.S. at 566.

The *Montana* test concerns tribal authority over non-natives on non-native fee lands within Indian country. Where tribal regulation of non-natives would be permissible on such fee lands, it clearly is permissible also on native lands.

291. For example, the Puyallup Reservation encompasses much of the city of Tacoma, Washington, including most of the city's port and industrial area. NAAG PAPER, *supra* note 159, at 2–3; Eikenberry Letter, *supra* note 265, at 3. Within the Puyallup Reservation, the state has issued more than 70 NPDES (water pollution discharge) permits. NAAG PAPER at 3; Eikenberry Letter at 3. Over 70 sources of waste discharge within a reservation inevitably may impact tribal health and welfare. See also cases cited *supra* note 252 (noting effects of non-native activities on tribal health and welfare).

292. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). See discussion *supra* note 235 ("mutual dislocations" presented by concurrent tribal/state regulatory jurisdiction).

trol regulations would negate tribal regulatory efforts. A tribal governmental scheme for pollution control, tailored to the needs, resources, and priorities of the reservation, easily could be nullified or supplanted by the imposition of a possibly conflicting state scheme.

Concurrent state jurisdiction also would interfere with the federal scheme providing that EPA and the tribes, not the states, have regulatory primacy over all "Indian lands."²⁹³ The EPA asserts that it and the tribes have authority, to the exclusion of the states, over all "Indian lands," a term that EPA equates with Indian country.²⁹⁴ The federal management scheme for pollution control thus contemplates only federal and tribal authority within Indian country. Manifestly, concurrent state jurisdiction would "disturb and disarrange" this federal plan.²⁹⁵

Finally, concurrent state jurisdiction over non-natives would result in checkerboard jurisdiction and interfere with the federal objective of tribal primary responsibility over native territory.²⁹⁶ Tribal control of the reservation environment is meaningful only if the native government can in fact control the whole of the reservation environment. Piecemeal or checkerboard jurisdiction by the state adversely may affect the tribal pollution control scheme, particularly where tribal laws and regulations are stricter than those of the state or where the native government has legislated supplemental laws not matched by the state. Spillover problems could be exacerbated if alternate parcels of land were subject to alternate environmental schemes. Moreover, state regulation of non-native inholdings would grant the state a degree of control over industrial development within the tribe's territory by granting or withholding permit authority at the discretion of the state, rather than the tribe. Thus, to avoid these problems, tribal pollution control authority in Indian country necessarily must be exclusive of the state for all persons, lands, and activities.

Despite some legitimate state interests in regulating all activities within state boundaries, tribal and federal interests in native self-government and control of reservation resources, development, and environmental and health issues outweigh state concerns. The backdrop of tribal sovereignty and federal promotion of native self-government, the fact that tribal and federal interests outweigh state interests in reg-

293. *Mescalero Apache Tribe*, 462 U.S. at 338 (state concurrent regulation is barred if it would "'disturb and disarrange'" a comprehensive federal management scheme (quoting *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1985))).

294. See *supra* notes 206-07 and accompanying text.

295. See *supra* note 293.

296. See *supra* notes 212, 235, 280 and accompanying text.

ulating on native lands, and the clear federal scheme encouraging tribal primacy in pollution control activities, all point to preemption of state pollution control laws and regulations in Indian country, over non-natives as well as over natives.

2. *Tribal Sovereignty*

The second and ostensibly independent barrier to state jurisdiction within Indian country is tribal sovereignty. Where the exercise of state jurisdiction would infringe on the sovereign rights of the native nation, state authority in native territory is barred.²⁹⁷ The relevant sovereign powers of tribes in the area of pollution control have been noted above: dominion and sovereignty over territory and persons, the rights to control land use, natural resources, environment, and economic development, and the right and duty to care for the health and welfare of tribal members.²⁹⁸ These powers—central to any sovereign—are sufficient not only to inform the preemption analysis, but to serve as an independent barrier to state jurisdiction within Indian country.

The impacts of state pollution control laws on the tribal exercise of these sovereign powers would be severe and detrimental. Politically, the application of state laws would place control over reservation environments in the hands of frequently hostile state governments. Tribal lands—often remote and sparsely populated—might become dumping grounds for state environmental problems. Reservation territories also might be the last areas of the state to receive attention or implementation of pollution control programs, not only because of location and population, but also because of the relatively insignificant political clout of native nations within the state structure. Under state regulation, states would be permitted to control pollution sources on and near reservations to the extent the state deemed acceptable, subject to federal minimum requirements. Native nations would lose even the ability to control pollution effects within their own territories.

Moreover, under state pollution control schemes, states could be vested with a significant degree of control over the development of the reservation and tribal resources. State standards more stringent than the federal minimums conceivably could block reservation development believed necessary by the tribe for economic security and the general welfare. Conversely, where a tribe wished greater protection of its environment through the imposition of more stringent standards,

297. See *supra* notes 69–72 and accompanying text.

298. See *supra* notes 248–53 and accompanying text.

state programs employing federal minimum requirements or state standards less strict than the tribe's might permit on-reservation development where the tribe would choose to block it. In either case, tribal control over the existence and pace of reservation development would be restricted.

Territorial integrity and control over natural resources are recognized generally as vital sovereign prerogatives.²⁹⁹ As a result of these sovereign rights, one state cannot regulate pollution sources in another state,³⁰⁰ and one nation is subject to supranational pollution control mechanisms only through treaty or agreement.³⁰¹ The right of sovereigns to develop their own laws and domestic policy, and to be governed by internal decisionmaking,³⁰² thus is particularly strong in the environmental protection field. Native American sovereigns—the tribes, bands, and nations of indigenous peoples—must be accorded

299. Present practice in international law inextricably binds sovereignty and territory: the exercise of legal authority over a particular territory is central to modern conceptions of sovereign competence. D. O'CONNELL, *supra* note 40, at 463 ("the exercise of sovereignty is predicated upon territory [and] this latter is perhaps the fundamental concept of international law").

The United States' pretension to exclusive mastery within its geographic boundaries was articulated early-on by Justice Marshall:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power that could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812). On analogous tribal sovereign rights, see *supra* notes 41–42 & 272–74 and accompanying text.

300. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); see also *supra* notes 163 & 173 and accompanying text.

In the international arena, and beyond the narrow context of environmental law, no international state may exert jurisdiction over questions arising within another's boundaries. "Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial . . ." *The Case of the S.S. "Lotus,"* 1927 P.C.I.J. (ser. A) No. 10, at 18; see also G. DAVIS, *ELEMENTS OF INTERNATIONAL LAW* 35 (4th ed. 1916).

301. Any nation may place voluntary limitations on its complete freedom of action, by treaties, contracts, leases, and municipal constitutions and laws, and is limited in its complete freedom by customary international law and legal principles adhered to by most nations (*jus cogens*). I. DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 29–140 (1974). While treaty or contractual arrangements do not serve to confer title or to effect changes in sovereignty, they may grant jurisdiction to the foreign state. See, e.g., *Canal Zone v. Coulson*, 109 U.S. 397 (1929) (Constitution does not apply in Canal Zone because United States is not owner in fee, but has use, occupancy, and control in perpetuity under treaty).

302. See *supra* note 42 and accompanying text.

the same rights of self-government and self-determination over the natural resources and the environment of their territory as those enjoyed by other sovereigns.

Implementing state pollution control schemes within reservation borders would lead necessarily to a diminishment of native sovereignty, with deleterious impacts on native governance, economic development, and resources. This unequivocal infringement on native sovereignty bars state environmental authority in Indian country.

IV. CONCLUSION

State pollution control laws and regulations are prohibited in Indian country. Under the three-tiered analysis proposed in this Article, state assertions of authority over native environmental concerns are preempted by federal law and the inherent sovereignty of the native nations. Virtually all state pollution control laws will be preempted either by the plain language of the federal pollution control acts, or by EPA's policy and statutory interpretation scheme implementing the federal acts.

States also may enact, pursuant to their general police powers, additional and supplemental pollution control laws in areas not covered by the federal acts. Under the infringement/preemption analysis, however, tribal and federal interests in retaining pollution control authority in the tribal and federal governments outweigh competing state interests in regulating environmental matters within reservation borders. State pollution control laws thus are preempted by the federal environmental management scheme for Indian country. Moreover, and more fundamentally, the application of state police power regulations severely would prejudice native governmental interests, and thus is barred also as an infringement upon native sovereignty.